

OUTLINES

OF THE

LAW OF CONTRACTS,

AS ADMINISTERED IN THE

COURTS OF BRITISH INDIA,

NOT ESTABLISHED BY ROYAL CHARTER.

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Contents.

PREFACE.

It is the object of the following treatise, to state shortly the leading principles by which the decisions of the Courts are regulated, or ought to be regulated, in cases arising out of Contract, within the territories of British India which lie beyond the limits of the three Presidency Towns.

It might perhaps have been expected, considering how those territories are peopled, that the Hindu or the Mahomedan Law would be resorted to for the decision of questions of this class,—and indeed, it has been laid down, that in the Supreme Courts at the Presidencies, established by Royal Charter, "All matters of contract and dealing between party and party shall be determined, in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos, and where only one of the parties shall be a Mahomedan or Gentoo, by the laws and usages of the defendant." (a)

(a) See Stat. 21, George 3rd, Chap. 70, Sec. 17, and the Madras and Bombay Charters, printed in Morley's Digest, pp. 603, 653.

Yet the privilege, if it can be so called, is of little value. Sir Francis Macnaghten bears witness that he "never knew or heard of an instance in which the Supreme Court was called upon, in a case of contract, to decide by Hindu laws and usages;"(a) and, if in the course of years, such a case may have occasionally arisen, still it is certain that the English Law is generally found to supply just principles for the determination of the cases which are brought before the Court.

In the Courts, on the other hand, which were not established by Royal Charter, and which have hitherto been called the Courts of the East India Company, or the Country or Mofussil Courts, it is only in cases regarding "succession, inheritance, marriage, caste, and all religious usages and institutions" that the Mahomedan law with regard to Mahomedans, and the Hindu law with regard to Hindus, are to be considered as the general rule by which the Judges are to form their decisions.(b)

By Regulation III. of 1793, section 15,(c) the Zillah and City Courts are prohibited "decreeing the payment or satis-"faction of any sum due on a tamassook or bond which may

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(a) Cons. Hindoo Law, p. 403.

(b) Reg. IV. 1793, s. 15; VIII. 1795, s. 3; III. 1803, s. 16.

(c) See Madras Reg. III. 1802. N. B.—By Bombay Reg. IV. 1829, s. 26, "The law to be observed in the trial of suits shall be Acts of Parliament and "Regulations of Government applicable to the case; in the absence of such "Acts and Regulations the usage of the country in which the suit arose; if "none such appears, the law of the defendant; and in the absence of specific "law and usage, justice, equity and good conscience alone."

"have been entered into after the 28th March 1780, unless the "bond shall be proved to have been executed in the presence "of two credible witnesses, or the payment of the sum de- "manded on the bond, or some other valuable consideration "for it having been received, shall be proved to the satisfaction "of the Court. But the restriction contained in this section "is not to extend to any bills of exchange, receipts or notes "of hand; in the determination on which the custom of the "country is to be abided by."

Cases arising out of contract are left to be determined in general by applying to each the principles of "Justice, Equity, and Good Conscience," to which, "where no specific rule may exist," the Courts have been referred for their guidance.(a) The words 'Justice, Equity, and Good Conscience' afford but an indefinite foundation for a judicial system, especially considering that the Judges are not trained lawyers, and that the native officers, in particular, are timid where they have no Regulations to guide them. Of course no private or individual effort could supply the want of a recognised system of substantive Civil Law, a want which is daily more and more felt as new interests and new kinds of property come into existence. It seemed to me, however, that some labour might be usefully employed in the endeavour to ascertain how the principles in question are actually applied to cases of contract, and what decision they would prescribe under a given state of circumstances. It is fortunate that with regard to the most ordinary contracts there is a large amount of substantial

(a) Reg. III. 1793, s. 21.

agreement between all systems of law, including those of the Hindus and the Mahomedans.

It will be manifest to any one who examines the decisions of the Sudder Courts upon this subject, that the grounds upon which they are put, coincide in general with the rules of English Law. It is natural that the law which embodies the conclusions of English minds, employed upon similar subjects, should be satisfactory to English Judges wherever they may be exercising their functions. Accordingly, the Judges of the Sudder Courts, although not regarding the English Law as a rule of binding authority in itself, have generally avoided any wide departure from its principles except in cases affected by some of the special features of Oriental life and transactions (which might of course in particular cases make it just and equitable to apply the Hindu or the Mahomedan Law), or by the peculiarities of the British Indian System of Government.

A very large proportion of the cases which the Courts are required to decide arise out of contract,(*a*) but the amount in dispute is frequently small, and hence the cases which appear

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(*a*) It appears by official returns that the suits disposed of in 1850 in the 20 Zillahs of Madras (not including the Agencies of Ganjam, Vizagapatam, and Kurnool) were 78,427, of which 64,092 or about 81 per cent. were for debt,—being a larger proportion than in Bengal. Of these, 50,786 were secured by some instrument in writing called a bond, while the remaining 13,306 were for simple debts.

In Bombay the number was 95,054: of which, 91,975 were connected with debt, wages, &c., 2,011 connected with land, 952 with caste, religion, &c., and 116 with land rent.

See Appendix to Report of Indian Law Commission, London, 1855.

in the Reports of the Appellate Courts are not sufficiently numerous to afford a satisfactory view of the prevailing doctrines. A treatise confined to the matters embraced by those Reports would omit many important heads of the law of contract.

I have therefore taken as the basis of the present work, the English law so far as it is generally applicable; entirely excluding all reference to two of its peculiarities (the Statute of Frauds and the distinction between contracts under seal and contracts not under seal) which enter so materially into all the English works on this subject as to render them almost useless in the hands of any but English Lawyers. I have arranged under their appropriate heads such of the decisions of the Country Courts as appear to recognize and to illustrate the principles of "Justice, Equity and Good Conscience" as applied to contracts; and I have noticed the chief enactments of the Indian Legislature which relate to the subject.

My text, where it is supported by such decisions and enactments, will form a guide to the rules which the Courts of the Bengal Presidency, and also the Courts of Madras and Bombay, may be expected to apply to the cases that may arise. Where not so supported, it can claim attention only as tendering for the solution of difficulties which, in the absence of any authoritative guide must daily present themselves, an abstract of those rules which have been accepted in England, and, for the most part, in all civilized nations, as reasonable and just. So far as they can commend themselves to the

reason of him who may consult this book, and no further, he ought to act on the principles here stated.

I have assumed on the part of the reader a general acquaintance with Hindu and Mahomedan law, but have in some cases found it necessary to refer particularly to those systems. Sir William Macnaghten has very justly remarked(*a*) that although cases of contract (and some other classes of cases) are not included among those which are to be governed by Hindu and Mahomedan law, yet "there may be questions, "incidentally involving these topics, and they may be so "interwoven with cases which it is the duty of the Courts to "decide agreeably to the Hindu law, that attention to the "principles of the one, may be essential to the due adjudica-"tion of the other. For instance, in a claim of inheritance, "the defendant may plead a title by purchase, and the ques-"tion will then arise as to how far the person who sold was at "liberty to contract;" and this again may involve many questions, *e. g.* as to the power of a childless Hindu widow to sell her deceased husband's property, the power of a Hindu in certain districts to alienate ancestral property, the age of majority of a Hindu or Mahomedan proprietor, the powers of an executor of a Mahomedan will, and the like.

But although the Courts cannot administer justice without considering the Mahomedan and Hindu laws so far as they bear upon the case before them, that is, in a case arising out of contract, as far as they regard the right of the parties to

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(*a*) Preface to Hindoo Law, p. viii.

contract,—and although a similar consideration must, when occasion requires it, be bestowed upon the laws affecting the rights of persons other than Hindus and Mahomedans,—still, when this investigation has been concluded, if the result is that a capacity to contract has been established, the case must be determined according to general principles, and not according to the peculiar system of law which may have been under discussion.

Although it may appear superfluous to refer at any length to the materials which I have used (in addition to those already mentioned) in framing so brief an outline as that now offered to the public, I would add that avoiding as much as possible all technical phrases and distinctions, I have followed, to a great extent, the order and arrangement of the Code Napoleon, and have made that Code the basis of my text, in the many cases in which it affords the best expression of the doctrines which, upon the principles above laid down, are properly applicable. I have also largely availed myself of the work of Pothier, upon which the Code Napoleon itself is in great measure founded. I have made use of many English books, and particularly of Mr. Addison's valuable treatise on contracts: and I have given several extracts from the "Principles of Law," for which the Punjab is indebted to Sir Robert Montgomery, and which must be regarded as an independent authority upon the subject of the laws and customs prevailing in that province.

I have not touched upon every species of contract; but have confined myself to those, which are of common occurrence,

and are not materially affected by the peculiar laws of Hindu and Mahomedans. I have therefore excluded the contract o marriage. The contract of mortgage has also been omitted because it has lately received full consideration in a work devoted to that subject.(*a*)

(*a*) See A. G. Macpherson on Mortgages, Calcutta, 1856.

3, *Stone Buildings, Lincoln's Inn,*
November 16, 1859.

OUTLINES

OF THE

LAW OF CONTRACTS.

CHAPTER I.

OF CONTRACTS IN GENERAL.

I SHALL here endeavour to give an outline of the doctrines of justice, equity and good conscience, as applied by the Courts of the country to those cases of contract which are chiefly noticed in the Reports; the English law being, for the reasons mentioned in the Preface, my warrant for those positions which are not fortified by express decision, and which require any authority beyond that of mere reason to support them.

A contract is an agreement which binds one or more persons, to another or several others, to give, to do, or not to do something. What is a contract.

It requires a concurrence of intention in (at least) two parties, one of whom promises something to the other, who on his part accepts such promise. An offer by one party, without acceptance by the other, does not amount to a contract, and cannot be enforced. Assent of both parties.

Thus a bidding at an auction is no more than an offer on the one side, which is not binding until the other side has assented, *i. e.* till the auctioneer, who represents the seller, has knocked down his hammer; and until that has been done, the bidder may retract. Bidding.

Time to elect. And if one man proposes to sell goods to another at a certain rate, and gives him a fixed time to determine whether he will buy them or not; as the latter is not, by this communication, bound to purchase, neither is the former bound to sell; and if he sells the goods to a third person within the time, it is held that as he entered into no contract, he has broken none, although such conduct is certainly against good faith and morality.

But the offer is understood, unless otherwise expressed, to continue, until the person to whom it is addressed can receive it and can give an answer. If it is addressed to a person at a distance, the offer is taken to subsist until return of post. If it is made through an agent, he must have time to communicate with his principal.

Essentials of contract. Four conditions are essential to the validity of an agreement.

The consent of the party who binds himself;

His capacity to contract;

A thing certain forming the subject matter of the contract;

A lawful consideration, or cause.(a)

Consent. Where a man's consent to a contract has been given through mistake, or has been extorted through violence, or surreptitiously obtained by fraud, such consent confers no validity upon the contract.

Mistake. Mistake is not a cause for annulling the agreement, except when it occurs in the very substance of the thing which is the object of the agreement.

Mistake in essentials. If one man buys a coin of another(b) as a genuine coin, and it turns out to be counterfeit, the buyer can recover the price from

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(a) S. D. Agra, 1856, p. 481. (b) S. D. 1852, p. 776.

the seller, although there was no specific agreement to that effect, because there was a mistake as to the very substance of the thing which was the object of the contract. But if a man buys a horse, supposing it to be sound, and not being misled by the vendor, and the horse turns out to be blind, the contract will hold good, because the purchaser has got that which he bargained for, though it is not so good as he supposed.

If there be a mistake or ignorance as to essential facts, as, if a party contracts to sell to another, "all his lands in a certain zillah" without any more particular description, being ignorant at the time that a person has just died and has left to him by will a landed estate within the zillah, the contract would not be held to comprise the land so left to him, for he could not have intended to part with a right, of the existence of which he was wholly ignorant. Mistake as to real property.

If one person should sell to another a piece of land which had before the moment of sale been swept away by a flood, or a horse which had died; without any knowledge of the fact by either party; the Court would relieve the purchaser from his bargain, upon the ground that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. Contract as to thing which has ceased to exist.

If A sells to B a cargo of wheat, supposed to be on its way from a certain port to the place where A resides, and it turns out that before the day of this bargain, the wheat had become injured, and had in consequence been sold at an intermediate port; the wheat no longer existing as an article of commerce, there is no binding contract.

So where the parties have been innocently misled, under a mutual mistake as to the extent of the thing sold. Mutual mistake.

Thus if it can be clearly proved that, at the time of the bargain, A thought that he had purchased from B a particular field as part of a certain estate, while B thought that he had not sold that field to A, the contract would not be enforced; for it would not be just to compel A to give that price for part only, which he intended to give for the whole, or that B should be obliged to sell the whole for what he accepted as the price of part only.

It is otherwise where there is no doubt as to what has really been bought and sold.

Mistake only as to quantity of thing.

If A sell to B an estate lying within certain boundaries, and described as containing a certain number of biggahs, and both parties be mistaken as to the quantity, though not as to the boundaries; the contract will not be void, although the number of biggahs be found to be more or less than was stated in the agreement.

Where vendor ignorant of value.

But the contract will not be less binding merely because the property sold was in point of fact more valuable than the seller supposed; as for instance, by containing a coal mine which he did not know of, and which was not valued in fixing the price. If the buyer was also ignorant, it is plain that the contract is binding, for each chose to act upon his own estimate of the property. Even if the buyer knew of the existence of the coal mine, he was not strictly bound to inform the seller of the circumstance, (however ungenerous the contrary course may be,) and therefore his knowledge alone will not vitiate the contract.

Where there is abuse of confidence.

If the buyer stood in such a relation to the seller, that it was his duty to inform him of the existence of the coal mine, (as for instance if he was the agent of the seller, and had acquired his knowledge in that capacity), then the seller must be consider-

ed as having been intentionally misled by the buyer, and the transaction cannot be supported.

There is no abuse of confidence, and therefore no ground for the interference of a Court, where neither relies on the other for information; but each acts upon his own knowledge and judgment (as merchants do with reference to markets), although the knowledge and the judgment of one may be much superior to those of the other.

Where one man employs another as his agent to effect a purchase, the latter cannot purchase for himself.(a)

Mistake as to person.

Mistake is not a cause for nullity when it occurs only as to the person with whom the contract is made; unless a feeling in favour of a particular person were the principal cause of the agreement, so that it would not have been entered into but for such feeling, and the contractor's belief that the person with whom he was contracting, was the person whom he intended to benefit.

Violence.

Violence exercised towards him who has contracted the obligation, is a cause of nullity; for where there is no free consent, there is no contract: and this principle applies equally, whether the violence was used by the person for whose benefit the agreement has been made, or by a third party.

It is difficult to state in general terms what the law will consider to be such violence as ought to invalidate a contract.

The mere circumstance, that one of the parties to a contract is in jail under regular process of a competent Court when he makes the contract,—if the act is done freely and upon sufficient information, (his confinement not being accompanied with any

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(a) S. D. 1858, p. 543.

undue and illegal force or privation), does not invalidate the transaction.(a)

In one case(b) the Court relieved a ryot from the payment of rent under his kubooleut, on the ground "that the facts were such as to lead the Court to infer, he being a ryot of the Zemindar, that he must have been under some degree of pressure, and therefore not an entirely willing party to the transaction, which was entered into solely for the benefit of the Zemindar:" and this, although the transaction was considered fraudulent in both parties, as against a third party, and but for the pressure, the ryot would not have been entitled to any relief.

Fraud.

Fraud is a cause of nullity of the agreement, not only where it is perfectly evident that the manœuvres and artifices of one of the parties have induced the other to contract with him, and that but for such artifices he would not have contracted; but also where such fraudulent practices have tended, and probably contributed to induce the party to enter into the contract. Where it is manifest that the fraud has had no effect whatever as an inducement to the contract, it cannot be insisted on as a reason for setting it aside.

Frauds are infinitely various, and every case must be judged of according to its own circumstances.

General commendation of wares.

The general terms of commendation which vendors are apt to apply to their own property do not vitiate a contract, though they may not be strictly true; as purchasers do not in general pay much attention to such expressions. So, if the representation is generally accurate, but there are some small exceptions not seriously affecting the value of the contract, as, where a house is

(a) 6 Sel. Rep. 247, S. D. 1840, p. 289.

(b) S. D. 1856, p. 774.

stated to be in good repair, while some small parts of it are out of order.

But where there is misrepresentation, positive in its terms, and seriously affecting the value of the contract, and amounting to a warranty or undertaking by the seller that the fact is as he states it, the law is otherwise; as, where a house described as being in good repair, is found to be affected with dry rot. Misrepresentation.

Where a jeweller represents a piece of crystal to be a diamond, the contract is void, whether he knew the representation to be true or false; for the other party relied on the jeweller's skill in his craft. But a warranty of a thing which can be perceived at sight, does not affect the goodness of the contract, as, "if one sells purple to another, and says to him this is scarlet," and wherever the statement does not tend to prevent the purchaser from making the usual inquiries and exercising his own judgment, it does not vitiate the contract.

Where a man has, either by express words, or by conduct naturally and necessarily leading observers to draw a false inference, enabled another to commit a fraud, (as where he being the owner of an estate or part of it, or being the next in succession to one who has only a life interest in it, stood by in silence, while another man sold the whole estate as his own property, or where he became subscribing witness to a deed of sale of the property, or where, being first mortgagee of an estate, he has become subscribing witness to a second mortgage not referring to the first, or even where his knowledge and assent to the transactions may be fairly implied from circumstances;) in all such cases(a) his interest will be postponed to the interest of those whom he has either Tacit fraud.

(a) S. D. 1846, p. 296; S. D. 1847, p. 333; S. D. 1857, p. 271.

expressly or tacitly aided in deceiving, and however much his own rights may have been prejudiced by the transaction, neither he nor any one claiming under him, whether by gift or by transfer, or relinquishment of rights, can set it aside.

Tacit fraud.

Thus where two Hindoo brothers were jointly entitled to land, and one of them died, leaving a widow his heiress according to Hindoo law, and the widow never registered her name as a proprietor, but allowed her husband's brother to retain the sole management and possession of the property, to mortgage it, and to sell it, and was herself an attesting witness to the deed of sale; she was not allowed to recover from the purchaser her husband's share in the land.(a)

If a man puts it into the power of another to hold himself out as the owner of his property, he is bound by the act of that other, so far as regards those who have innocently dealt with him.

Where the ostensible owner of land, (although under a secret trust) grants a lease to a person not acquainted with the existence of the trust, the lease is good against the real owner.(b)

If a man by his acts or words represents his property as alienable, he will not be permitted afterwards to dispute on his own behalf, its capability of being alienated. Where a jaghiredar raised money upon mortgage of his jaghire, it was held that he was not at liberty afterwards to dispute the validity of the alienation,(c) and generally, if a person induces another to enter into a contract, upon incorrect representations of facts, he is bound to make good the representations.

Fraudulent concealment.

There may be fraudulent concealment as well as fraudulent representation, and the legal effects of each are the same. For

(a) S. D. 1857, p. 275. (b) S. D. 1858, p. 309. (c) S. D. 1851 p. 253.

instance, if the vendor of a house, being conscious of a defect in the main wall, plasters it up for the purpose of concealing it from an intending purchaser; or, if the seller of wares, knowing them to be damaged by the sea, sells them without mentioning the fact to the purchaser, who buys them without seeing them, on the faith of the vendor's representations; or if a debtor induces his creditors to compound their claims by concealing from them the true state of his affairs: all these acts of fraudulent concealment are visited with the consequences of fraudulent misrepresentation.

Effect of selling "with all faults."

Sometimes an article is sold expressly "with all faults," but this provision, though it puts the purchaser on his guard, will not throw the burden of examining the article, and of testing its value so entirely upon him, as to avail the vendor, if he has used any artifice to disguise the defects of the thing sold, and to prevent their being discovered by the vendor; or if he has been guilty of wilful and intentional misrepresentation in a matter of any importance to the contract.

Intoxication.

There can be no serious and deliberate consent where a man is deprived, by intoxication, of the use of his reason and understanding. For this reason, where a man of weak intellect, being entirely in the hands of his servant, executed, while in a state of intoxication, a bond in favor of the servant, on account of the price of clothes and other articles alleged to have been purchased for him by the servant, but which could not be proved to have been so supplied; the Court dismissed with costs a suit which was brought to enforce the condition of the bond.(a)

Inadequacy of price.

In certain cases, or with regard to certain persons, extreme inadequacy of price is often one of the circumstances from which

(a) S. D. 1815, p. 34; S. D. 1881, p. 612.

it may be reasonably inferred that fraud has been practised upon a contracting party, but if the transaction is otherwise unimpeachable, inadequacy alone is seldom if ever, considered sufficient to warrant the inference that fraud has been employed.(*a*)

Deed not binding until delivered unconditionally.

Although a deed has been duly executed, it is not binding, unless the party whom it is intended to bind by it, has delivered it out, unconditionally.(*b*)

If the delivery (though not the execution) has taken place through fraud, mistake, or coercion, the Court will not give effect to the deed as a valid instrument; but, on the contrary, will interfere to prevent any unconscientious use being made of it.

Land had been sold for a certain price, but the purchase money not being paid in full, the bill of sale, or *cowalah*, was lodged with a third party, with the understanding that it was not to be given over to the purchaser till the balance should be paid.

In violation of this agreement it was delivered up to the purchaser, while no portion of the money still due had been paid by him.

The Court decreed that the *cowalah* should be cancelled, and of no effect.(*c*)

Plea of mistake, &c.

Where any one seeks the aid of the Courts to enforce the provisions of an agreement, the person sued may plead the mistake, violence, or fraud, and this defence, if proved, will be held valid.

Suit to cancel instrument.

But an action for the cancellation or rescission of the document is the proceeding most commonly adopted; for while a document remains unimpeached, it is capable of being registered and otherwise acted upon, and of being exhibited to third parties who may be deceived by it; and the document may remain, while those who can prove that it was unduly obtained, may die or disappear.

(*a*) See S. D. 1847, p. 578. (*b*) Agra, 1854, p. 69. (*c*) S. D. 1846, p. 167.

Purchase by agent or guardian.

The Courts ought not to admit readily the suggestion of fraud; but it is difficult to resist that plea, where a man has purchased from those to whom he stood in any fiduciary relation, as where a manager buys the estate for which he is agent;(a) or if a guardian enters into any transaction with his ward who has only just come of age; in such cases very clear proof indeed is requisite, that the transaction was fair and beneficial to the principal or the ward.

Voidable contract may be affirmed.

A contract entered into under the influence of mistake, violence, or fraud, is not absolutely void. It may be retrospectively sanctioned, by the person injured, when in possession of full information, and freed from all coercion. He may abandon, if he pleases, the right, which exists solely for his own benefit, of setting it aside; and may give it validity, either by express ratification, or tacitly, by availing himself of the provisions favorable to himself.

The plea of fraud or violence is not available in behalf of the guilty party or any one claiming through him.

Contract for act of third person.

A man may vouch for a third person, by undertaking or guaranteeing that the latter shall do or abstain from doing something; and if the third party refuse to perform the agreement, the person who has given the guarantee must himself make it good.

Where a man borrowed money(b) on the security of a deed, purporting to make over by way of mortgage an entire eight annas or half share which was held by the mortgagor and his nephew jointly; the Court considered the effect of this to be, that the party executing received the loan, on the engagement that he

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(a) S. D. 1847, pp. 574-578. (b) S. D. 1851, p. 750.

should make over or arrange for making over the whole eight annas. But he failed to obtain the concurrence of his nephew, and therefore he only placed the mortgagee in the possession of a four annas or quarter share. He was held to be plainly bound to repay half the advance received by him, with interest: this being apparently the species of relief sought by the plaintiff.

Stipulation for benefit of third person.

A man may stipulate for the benefit of a third person.

Thus in selling an estate, he may stipulate that the price shall be paid, not to himself but to a certain person named by him; or a man granting a lease on favorable terms may stipulate for some advantage to one of his dependents.(a)

A man contracts for heirs and assigns.

A man is in general deemed (unless the contrary be expressed) to have contracted for himself and for his heirs and assigns; that is, for those who may become entitled to stand in his place, either by transfer during his life, or by succession upon his death, and this applies to liabilities as well as to rights. The nature of the agreement may indeed be such as to make it impossible for another person than the contractors to require, or to grant, the performance of it; as for instance a contract of marriage, or a contract by one person to teach another.

Rights of assignee of lease.

If a man who holds land on lease for years, makes an underlease at a rent, and afterwards assigns his lease, the assignee of the lease stands in his place as to the rent, and can recover it from the underlessee.(b)

If the first lessee has (previous to making the assignment) granted any valid remission of rent, by which he could himself be bound, the assignee is bound thereby.(c)

Heir of independent Rajah.

If an independent Rajah has landed property within the British territories, and incurs debts, and pledges the rents of that pro-

(a) Agra, 1852, p. 620. (b) S. D. 1855, p. 88. (c) Ib., p. 90.

perty as a security for payment, his heir, who has succeeded him in the property, cannot successfully plead that, according to the custom of the Raj, he is not liable for the debts of his predecessor.(*a*)

Who are bound by wajib-ool-urz.

He who purchases a share in an estate, from one who was a party to the compact called wajib-ool-urz, drawn up at the time of settlement, is bound by the provisions of that compact(*b*), but it is not so where the purchase has been made from one who was not a party to the wajib-ool-urz, but who subsequently evicted those who held the share in question, and who were parties, in respect of it, to the wajib-ool-urz.(*c*)

Assets the measure of liability.

The responsibility of the heirs or representatives of a deceased debtor, extends no further than to the amount of the property derived from him.(*d*)

Where rent cannot be enhanced.

If a proprietor of land induces a man to build a house upon the land, on the understanding that he is never to be called upon for more than a certain rent, then agreed upon; neither that proprietor nor any one claiming under or through him can enhance the rent or oust the tenant or his assigns.(*e*)

The grantor has a right, upon every succession to a limited grant, to inquire whether the party putting himself forward as the successor of the last holder, has a right to do so according to the conditions of the grant.(*f*)

Assignee of zemindar.

Although the Government has a lien upon all land for the revenue assessed thereon, yet it seems (although there has been some difference(*g*) of opinion upon the subjects) that the zemindar

(*a*) S. D. 1856, p. 977. (*b*) Agra, 1852, p. 48. (*c*) Agra, 1855, p. 661.
(*d*) S. D. 1856, p. 97. (*e*) S. D. 1845, p. 243.
(*f*) S. D. 1855, p. 589; 1851, p. 120.
(*g*) S. D. Agra, 1854, p. 219; Agra, 1853, p. 515; See contra S. D. 1855, p. 395.

may dispose of the rent so long as the payment of the Government revenue is not affected thereby. A zemindar may lease out any lands on such terms as he pleases, or may forego the rent altogether, and the agreement will be binding on him and on any other parties, deriving their title through him, though they would be cancelled by a sale for arrears of revenue, which, by law, relieves the estate from such incumbrances.

In a case in the North-West Provinces, a zemindar, selling his village, obtained from the purchaser an agreement that he should hold his seer land on the same terms as before. The purchaser sold to a third party who claimed rent for the seer land; but it was decided(*a*) that the stipulation with the first purchaser was binding upon the second,—who succeeded to all his engagements.

Assignee of indigo factory.

Although the purchaser of an indigo factory commonly takes over the rights and liabilities of his predecessor, this is only by a contract in each case between himself and the vendor, and there is no foundation for the popular belief that without such express contract a person purchasing a factory is responsible for debts due from his predecessor, and is entitled to all sums due to the latter.(*b*)

A man does not become liable, on buying a lease of a factory, for rent which accrued before he obtained possession, nor does he become liable, in the absence of express contract, to a claim, by a a servant or assistant employed on the premises, for arrears of salary.(*c*)

Of course, after the execution of a bill of sale, by which a factory is made over, with all outstanding balances and sums of money, due and owing by ryots and others to the factories or to

(*a*) Agra, 1854, p. 219.
(*b*) S. D. 1856, p. 199; See S. D. 1848, p. 186; S. D. 1857, p. 720.
(*c*) S. D. 1852, p. 716; See Ibid, 1054.

the former proprietors, a former proprietor cannot sue for a balance due to him previous to the sale.(*a*)

One mutwullee, or superintendent of a charity, may succeed another in the enjoyment of a zemindary or other interest in land, under the same deed of endowment, and they are all in the eye of the law the same person: so that the contract of one in his official capacity, would bind his successor.(*b*) Acts of official proprietor bind his successor.

So in the case of a Mohunt(*c*) whose muth or temple descends by official succession. In muths of this class, a successor is usually nominated by the Mohunt during his life-time; if not, after his death, the *chelas* or disciples, and *gooroobhaes*, or spiritual brethren, assemble, and select the eldest *chela*, if properly qualified; otherwise some other of the *chelas* or *gooroobhaes*, or even *chelas*, &c. of another muth. If they cannot agree in their choice, the ruling power is applied to, which commands an assembly of Mohunts to select a proper person, and confirms such person, when selected, in the guddee or superintendency.

An independent zemindary has long been held by a Roman Catholic priest, and his successors, regularly nominated by the acknowledged superiors of the associated body of Portuguese priests, being Augustinian monks.

In all such cases the official contract of the incumbent, not being of a nature manifestly injurious to his successors, would bind them.(*d*) But such persons have no power to alienate for their own purposes the property which they administer, and a suit to enforce the performance of a contract to that effect will be dismissed.(*e*)

(*a*) S. D. 1849, p. 479. (*b*) S. D. 1856, p. 304. (*c*) S. D. 1855, p. 323.
(*d*) S. D. 1856, p. 296. (*e*) S. D. 1845, p. 153; Sel. Rep. v. 6, p. 262.

CHAPTER II.

DISABILITY TO CONTRACT.

Persons under disability to contract.

Every person may contract, unless he belongs to one of certain classes, who are regarded by the law as incapable of doing so.

As the essence of a contract consists in consent, a person must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract.

Children, therefore, and persons wholly destitute of reason, and such as are deprived of the use of reason at the time, by disease or by drunkenness,(a) cannot contract by themselves, but they may, in some cases, contract by their guardians or curators.

Married women are in some cases subject to a disability imposed upon them with reference to the rights of others.

Minor.

The inability of minors to bind themselves by contract, is laid down in general terms, by the laws of all nations, but there are in every system of law some qualifications of this general rule. It is necessary therefore in each case to refer to the system of law by which the personal *status* of the individual as, (e. g.) English, Mahomedan or Hindoo, is determined.

Powers and disability of, by English law.

By the English law a minor is capable of taking an estate by descent or by purchase, and of receiving possession of it: and moveable property may be presented to him. In these cases the donor is bound by his own act, and cannot revoke it.

Contracts beneficial to him are valid.

But any gift to a minor may be waived by him, when he comes of age, because it may be more advantageous for him to be with-

(a) Supra, p. 9.

out the property, since the incumbrances on land given to him, or the rent reserved on a lease, may be more than the value; and his heirs may reject the grant if he has not lived to agree to it.

What constitutes acceptance of gift.

If a minor continue in possession, after his full age, of land leased to him during his infancy, he affirms the lease, and becomes liable to the arrears of rent incurred before.

Minor may exercise authority.

The acts of a minor which do not touch his interest, but take effect from an authority which he is trusted to exercise, are valid. Thus an officer who is a minor, may perform the duty of an office which he may hold, including (if it be his duty) the entering into contracts on behalf of the Government.

Laying out of view the contract of marriage, a minor's promise is, generally speaking, absolutely void, as against himself.

Where minor may bind himself.

He may, however, bind himself to repay the price of necessary repairs for his own house: since that is for his benefit.

Where articles are furnished to him at his father's house and with his father's knowledge, he is considered merely as the agent of the latter, who is liable for the cost of the articles.

If he has no father, or lives apart from his father, and is not furnished by him with food, raiment, lodging, instruction, and all other things which are necessary for his use, considering his fortune and his station in life, he may bind himself to repay the price of such necessaries to any one who will provide them.

Yet he cannot bind himself by the recitals of a deed, nor by an account stated, even of monies due for necessaries; because the law does not suppose him capable of accurate computation: and he cannot bind himself of by any bill drawn, accepted, or indorsed in the course of trade, or by any negotiable bill, even for necessaries.

Such contracts of minors as the Court can pronounce to be to their prejudice are merely void. Of this class is a bond with a penalty, conditioned for the payment of interest.

Privilege of minority personal only.

The privilege of a minor is a personal privilege, of which he alone can take advantage.

The drawer, therefore, of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the action of the indorsee; nor can the acceptor set up the infancy of the drawer as a defence to such an action.

Action for wrongful act.

An action is maintainable against a minor, if he refuses to re-deliver goods which were delivered to him for a special purpose in ignorance of his minority; the transaction cannot be said to amount to a contract because the minor has not capacity to make a complete contract, but he is considered to have got possession of the goods wrongfully.

Ratification at full age.

If a bill be accepted by a party after he is of full age, he will be liable, although he was an infant when the bill was drawn.

If goods which are not necessaries are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound. But the promise must be voluntary, and not extorted from the party in ignorance of his privilege, nor under the terror of an arrest.

An infant cannot trade, because he cannot be liable on contracts entered into by him in the course of trade. A contract to enter into trade is one which he may avoid when he comes of age; and where it is part of the contract that a sum of money shall be paid in advance, as a deposit, and the sum has actually been paid, he may recover it.

Minor not subject to penalty.

The principle which exempts a minor from any forfeiture or penalty annexed to a contract, (even for necessaries), extends as

well to a penalty enforced by requiring money to be handed over in advance, as to penalties accruing on the breach of a condition.

But it is otherwise if a minor has derived any advantage under a contract. If he should pay for expensive clothes or other articles not necessary, and after wearing them, bring an action for the price; in such an action he could not recover, although the tradesman, if unpaid, could not have enforced payment.

In what sense minor may be a partner.

A minor may by law be a partner with other persons, and be entitled as between himself and them to all the benefits resulting from the partnership, and they, who have given him the power and authority of a partner, are liable for debts contracted by him in the name of the firm. But he is not responsible for the debts contracted during his minority. If there is a partnership subsisting when he comes of age, it continues till something is done to dissolve it; and if the late minor gives no notice of dissolution, he is liable for all the debts contracted by the firm after he came of age.

Minor not to profit by fraud.

A minor is not, any more than an adult, allowed to retain benefits which he has derived, however innocently, from the fraud, imposition, or undue influence of others; and if trustees selling property for minors misrepresent the quantity, though innocently, the purchaser shall have what the vendor can give, with an abatement out of the purchase money for so much as the real quantity falls short of the representation.

It seems scarcely necessary to add, that in the case of fraud of which an infant is conusant, minority affords no excuse.

Minors, trading under pretence of being of full age, are not allowed to plead their minority.

If a person having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right, although under age.

Presumption as to age.

It will be presumed, until the contrary be shewn, that a person who contracts is of a proper age to contract.

By Mahomedan law.

The Mahomedan law of minority seems to agree generally with the English.(a)

By Hindoo law.

The writers upon Hindoo law lay it down in general terms,(b) that minors cannot contract, and do not state any exceptions; but the guardian possesses considerable power, and it is to be remembered, that among people who live so much in joint family as the Hindoos, and among whom the age of majority is so early, minors are not in general likely to be without guardians, or to be living away from them.

Minor partner in Hindoo firm.

It is indeed not unusual in India for minor partners to take a part in the ordinary business of mercantile or banking firms under the guidance and direction of the managing heads, and to sign hoondees; and so far as he is to be regarded as the agent of adult partners, the minor's signature would be binding upon the firm. But he could not be made personally liable to make good the amount. And it has been decided that a minor who has ordinarily done thus much, is yet incompetent to agree to an adjustment of accounts.(c)

Powers of father and guardian.

During the father's life-time, where there is land which cannot under ordinary circumstances be alienated without the concurrence of the son; if the son be under age, his concurrence in an

(a) See Macnaghten's Mah. Law, pp. 42, 43, 63.

(b) 1. Strange, p. 270; W. Macn. v. 1, p. 109; v. 2, pp. 294, 305.

(c) Agra, 1853, p. 166; and see Petumber Doss, vs. Ramdhone Doss, Taylor's Reports, p. 279; S. D. 1848, p. 427.

alienation by the father will be assumed, where the transaction has reference to some distress, under which the family labours, or some pious work to be performed, the early completion of which concerns the other members of it.(a)

After the father's death, the guardians may sell or mortgage the estate of the minor where it becomes necessary to do so for the benefit of the minor himself, as, for instance, where the money is required for his education; for his maintenance and that of his mother; or for the payment of Government Revenue:(b) but not of course for the purposes of unjust litigation(c) or any other object which is not beneficial to the minor.

The deed of a minor Hindoo would probably be held not void but only voidable if against his interest.

It is to be remembered that if a minor is under the Court of Wards, neither his mother nor any other guardian has any authority to borrow or disburse on account of the minor, even to save his estate, without the orders of the Court of Wards.(d)

So unbending are the rules regarding the tenure of land, that if they be not observed, a minor loses his land. This is the case with all, from the khood kasht ryot to the zemindar.(e)

Ratification at full age.

If a minor after coming of age, freely and with full knowledge adopts and sanctions a transaction concluded in his name or on his behalf during minority, he cannot afterwards sue to set it aside on the ground of minority.(f)

(a) 1. Strange, p. 19; See S. D. Agra, 1857, p. 14.
(b) 1. W. Macn. p. 111; Sel. Rep. v. 5, p. 55; 2. Morley's Digest, pp. 40, 105; S. D. 1856, p. 980; See Agra, 1853, p. 158; S. D. 1856, p. 170.
(c) S. D. 1853, p. 531.
(d) S. D. 1845, p. 279; Reg. X. 1793, S. 19.
(e) S. D. 1853, p. 301.
(f) Agra, 1856, p. 524; S. D. 1853, p. 525.

Insanity. The insanity of a contracting party vitiates the contract, although he may not have been declared a lunatic under Reg. X. of 1793, and VI. of 1822, and if the allegation of lunacy be relevant in any suit, the Court will investigate its truth.(a)

Drunkenness As to contracts with drunkards and persons of weak mind, not wholly incapable of giving consent, but whose free and deliberate consent has not been given, the law is the same as regarding insane persons.(b)

Married women by English law A married woman is by the English Law subject, in consequence of her coverture, or married state, to a variety of disabilities. She is incapable generally of contracting, or of doing any other act so as to bind herself or her husband, unless by his authority, and as his agent, and such acts done by her are merely void.

Though she cannot convey, she may, however, in general accept an estate until the husband dissents. And she may in all cases act independently of her husband where she is executrix, or exercises any mere authority or power with which she is invested on behalf of a third person. There are also, with respect to the disabilities above enumerated, several exceptions which require attention.

First, as the husband is bound to maintain her, her contracts made for the sole purpose of supplying herself with necessaries suitable to her station in life, will, in general, be binding upon him, though not upon herself. For if they be living together, his consent to such contracts will ordinarily be presumed; though the presumption is capable of being repelled by special circumstances, as by notice to the particular tradesman not to trust her. And not only while they cohabit, but even in the event of a separation

(a) S. D. 1840, p. 293. (b) Supra, p. 9.

by consent, he is in general liable on her contracts for supplies of this description, if no provision be otherwise made for her; for the tradesman is then considered (even though he has notice not to trust her) as standing in her place, and as enforcing indirectly, her right to be maintained. But on the other hand, the husband incurs no such liability if she departs from him against his will, and without sufficient excuse arising from his ill treatment, or is dismissed by him for adultery, or during the separation commits adultery, or if by sentence of Court, or by private arrangement, she has a separate allowance secured to her, and regularly paid. A wife may also contract like an unmarried woman, so as to bind herself, and may sue or be sued, or do any other act like an unmarried woman, in case her husband be transported upon an attainder for felony.

A Court of Equity will also allow the estate of a married woman, settled on her to her separate use, to be conveyed or charged by her at her pleasure, if the instrument by virtue of which she acquired the property contains no provision to the contrary.

By the Mahomedan law.

The Mahomedan law would seem to allow to married women all or nearly all the powers in respect of contract, that a man possesses.(a)

By Hindoo law.

On the subject of a Hindoo wife's power to bind herself by contract, Sir William Macnaghten writes as follows.(b)

"The Hindoo law recognises the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has, nevertheless, power to use and consume it in case of distress, and she is subject to his control,

(a) Macn. Mah. Law, pp. 43, 254. (b) W. Macn. Hindoo Law, v. 1, p. 122.

even in regard to her separate and peculiar property. It is a general rule, that coverture incapacitates a woman from all contracts, but those contracts are valid and binding which are wives, the livelihood of whose husbands chiefly depends upon their labour,(*a*) so also are those made for the support of the family during the absence or disability, mental or corporeal, of the husband."(*b*) And Sir Thomas Strange(*c*) writes to the same effect.

It will be found, however, upon an examination of the authorities cited from the Digest by these learned writers, that in the passages referred to, the discussion is merely as to the prudence of lending money to a married woman, with reference to the claim thereby acquired against her husband, or to her own independent means of making re-payment. It is nowhere asserted, that coverture incapacitates a woman to contract, and I believe that the Hindoo law does not recognize any such doctrine.(*d*)

I believe that the correct view is, that except in cases where by the Hindoo, as by the English law, she may be reasonably taken to have contracted merely as the agent or servant of her husband, she is fully capable of(*e*) entering into any lawful contract, whether she has separate property or not.

(*a*) Dig. vol. 1, 318: and 2 W. Macn. Hindoo Law, p. 278.

(*b*) Dig. v. 1, p. 296.

(*c*) Hindoo Law, v. 1, p. 274.

(*d*) The text of Macnaghten is taken from the language of the Pundit, v. 2, p. 278. But the question there put, relates solely to the wife's power of binding her husband; and his answer, though general in its terms, relates to the same matter only.

(*e*) See S. D. 1857, p. 661.

CHAPTER III.

CONSIDERATION.

Object and matter of contracts.

EVERY contract has for its object some thing which one party binds himself to give, or which one party binds himself to do or not to do.

Illegal objects.

Agreements are null if they relate to that which neither party has a right to dispose of, and which cannot be legitimately bought and sold. Thus, employments in the Public Service cannot be made the subject of a bargain.

Champerty and maintenance.

There are certain heads of English law, relating to what are called "Champerty" and "maintenance", upon which the Courts of this country have not expressed themselves very distinctly. The latest dicta upon the subject are nearly in the following terms.(a) "Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it, and maintenance generally signifies an unlawful taking in hand or upholding of quarrel to the disturbance and hindrance of legal rights. Supposing that the English law on those subjects were to be followed as law in this country,—a supposition not in accordance with the tendency of the recent decisions of this Court, they would have no place in the case before us: we therefore do not follow those points further, but content ourselves with remarking, that however wise and salutary may have been the principle upon which these doctrines were

(a) S. D. 1858, p. 842.

based in England, it is very questionable whether they should be adopted in this country; the possession, it has been observed, which has the benefit of the protection of the law is, by the very supposition of the case, a possession founded on wrong, and the practical effects of prohibiting any contract with relation to the right which is withheld, is to render that right nugatory and unavailing, unless the party in whom it is vested has in his own funds the means of resorting to legal remedies for its infraction."

What may be subject of contract.

The Sudder Court has recently laid down(a) that the sale of a right or interest in a property in suit is legal, and that, if in such a matter the words "right of suit" be used, they are used only as equivalent terms. The mean is used instead of the end, the action by which the property is to be obtained instead of the property itself to be obtained. They held, moreover, that any contingent, executory or future interest, or possibility coupled with an interest, in any real property, may, under the system of law in force in the Courts, be disposed of and contracted for. As to personal property, they held that all rights of action, whether, (as in the case before them) for the recovery of pecuniary damages for the infliction of a wrong, or for the non-performance of a contract, or for the procuring of the payment of money due, are assignable.

It must be determinate in kind.

The obligation must be such as the parties can understand, and the Courts, if necessary, enforce. It should have for its object some thing of a certain and determinate kind: as for instance, so many casks of oil of a certain description, known in commerce: not so many casks of oil, generally.

(a) S. D. 1858, p. 956.

The quantity of the thing may be uncertain, provided it is capable of being determined, as "all the grain which is at this moment contained in my granary at A"—or "all the costs which you may incur in defending a particular suit."

Contracts regarding things future.

Things future may be the objects of an obligation, as, the whole crop of rice which shall be raised next year on a particular field, or the indigo which shall be manufactured next year at a particular factory. But such an obligation depends upon the condition that such articles shall come into existence, or that it shall be possible to produce them, and it is void if no crop can be raised or no indigo manufactured.

Contracts without consideration.

An obligation entered into without any consideration at all, cannot be meddled with after it has once been performed. If not carried into effect already, it will not be aided by the Courts.

Voluntary donation.

A man may, of his own accord, bestow any part of his property upon another, and if he does so he cannot recover what he has given away; neither he nor his heirs can dispute what he has once deliberately done, whether it was wise or foolish.(a)

Promise without consideration.

But a mere promise, without consideration, that is to say, an agreement that A shall do something for or pay something to B without a stipulation for any thing (however small) to be given, or done or suffered by B in return, does not amount in law to a contract, and A cannot be compelled to perform it.

A consideration may be good, and sufficient to sustain a transaction, although it is not a valuable consideration.

A good or meritorious consideration is blood, or natural love or affection.

(a) See S. D. Agra, 1854, p. 512.

Failure of consideration.

Where the supposed consideration for an engagement is false, the engagement is inoperative. If for instance, upon the false supposition that A owes B a thousand Rupees, left to B by the will of A's father, but which has in fact been taken away by a codicil of which A is not apprised, A engages to give to B a certain piece of land in discharge of that legacy, the contract is null, because the cause of it, which was the acquittance of a debt, is false. Therefore on the falseness of the cause being discovered, A not only will not be compelled to deliver possession of the estate, but even if he has conveyed it he is entitled to reclaim it, and this even although B was equally in error as to the fact when the contract was made.

A Hindoo widow, heiress and representative of her husband, being, as she stated at the time, under the necessity of raising money to pay her husband's debts and to save his whole estate from sale, borrowed money, making thereupon a conditional sale of a certain portion of the estate. Her husband's relations afterwards, in a suit in which she colluded with them, obtained a decree for the reversal of the conditional sale on the ground that no necessity existed for the conditional sale, as she had sufficient means for the purposes assigned. It was decided(a) that the consideration having wholly failed, the widow was liable to repay the borrowed money with costs and with interest from the date of suit.

The agreement is not less valid, although the consideration be not expressed therein.

Deed.

It is not enough to prove the existence of a contract, without proving that it was founded upon a proper consideration.

(a) S. D. 1857, p. 275.

By the laws of most countries, a bond or other acknowledgment, signed by the obligor, or person professing to bind himself thereby, and attested, is regarded when its execution has been duly proved, as affording at least *primâ facie* proof of the payment of the consideration which is therein expressed to have been received. The only object, indeed, of committing agreements to writing, is to preserve evidence of their terms, which may be available hereafter. Express evidence of the payment is, however, required in the Courts of Lower Bengal; though not, apparently, in those of the North-West Provinces.(*a*)

Where accounts have been settled between the parties, and a balance struck, and the fact of the adjustment itself is proved, and that it was made voluntarily by a sane person upon full information; a contract to pay the balance is implied, even if not expressed.(*b*)

Deed.

It may be laid down, generally, that although a claim is often discredited in consequence of its not being evidenced by writing, yet it may be proved without writing; while, as already stated, the circumstance of its being so evidenced is by no means conclusive in its favour.(*c*)

In the absence of a bill of sale of land, and of a receipt for the purchase money, it has been held necessary that the fact of sale should be satisfactorily established.(*d*)

And in one case it was laid down by the Sudder Court of Agra, that in the then state(*e*) of judicial practice in the North-Western Provinces, a sale of land might under some circumstances be held

(*a*) See Civil Procedure, Ed. 3, p. 296. (*b*) Agra, 1852, p. 531.
(*c*) S. D. 1847, pp. 43, 129; S. D. 1846, p. 160; S. D. 1847, p. 647; S. D. 1852, p. 702.
(*d*) 4 Sel. Rep. p. 168. (*e*) Agra, 1849, p. 219.

to be perfect, although the deed which evidenced the conveyance might not have been delivered to the purchaser.

"The Mahomedan law (it was said,) does not require this condition to the validity and perfectness of a sale of land, and although our Courts are not bound to attend to that law in matters of contract, the practice which has obtained under its provisions must not be set aside without extreme caution."

Although it be provided, by a bond given on the occasion of borrowing money, that no payments are to be taken into account unless entered on the back of the bond; yet the Court will receive evidence to shew that such payments were made, though not entered; and will regard the prohibition as a mere precautionary measure between the parties.(a)

Where the payment of the cash consideration as expressed in the bond was disproved, except as to a small sum, but it was proved that the obligor acknowledged that he had received the whole sum inserted in the bond, the Court decreed the full amount.(b)

Illegal consideration.

The consideration is unlawful when it is prohibited by the law, when it is contrary to good morals or to public order.

Things against morality or public policy.

A suit may not be brought for anything repugnant to positive law, to morality or to public policy, as for the division of gains unlawfully acquired; or to enforce the performance of an engagement which it would be fraudulent or immoral to fulfil, such as a conspiracy to cheat a third party, or an agreement to defeat his rights, or to evade the rightful process of law,(c) or an agreement to compromise a prosecution.

The Court will not enforce such compacts, because it regards them as intrinsically null, if the thing stipulated for is in itself

(a) S. D. 1853, p. 544. (b) Agra, 1848, p. 250. (c) S. D. 1849, p. 276.

contrary to law; and a man who is now willing to obey the law will not be compelled to contravene it, whatever agreement he may have entered into.

Principles on which Courts act.

The rule is, that the Courts will not act in furtherance of an illegal purpose; and although as against an innocent party no man is allowed to set up his own iniquity as a defence, any more than as cause of action, yet where a contract or deed is made for an illegal purpose, a defendant against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff; and the objection is allowed, not because the real justice of the case as between that plaintiff and that defendant requires it, (for in truth the inaction of the Court leaves the defendant unchecked in the commission of a fresh act of immorality,) but because it would be an encouragement to immoral and illegal transactions, and injurious to the general interest of society, if the Courts lent their aid in any way to a man who founds his cause of action upon an immoral or illegal act.(a) So when property has been placed in the hands of a man for illegal purposes, if he refuses to account for the proceeds, the party aggrieved must abide by his loss.(b) Neither can be assisted by the Court, and the consequence is, that he who has got possession of the property in dispute is enabled to retain it.(c) Nor can an action, for contribution be maintained by one of several joint wrong doers against another, although the one who claims contribution may have been compelled to pay the entire damages recovered as a compensation for the wrongful act; for it is held, that men will be less ready to do wrong if they are left to bear all the consequences themselves.

(a) Agra, 1856, p. 418, 479. (b) S. D. 1846, p. 104; S. D. 1847, p. 124.
(c) S. D. 1853, p. 639.

What relief as between wrong doers where under pressure.

Relief however is sometimes granted where the parties have not been equally blameable, but one has exercised undue pressure upon the other. A, a great zemindar, executed a fictitious lease to B, and B gave the usual *cubooleeut;* the object of the whole transaction being to defraud a third party. A afterwards obtained a decree in a summary suit before the Collector against B for rent under the *cubooleeut*, and B brought an action to reverse the decree.(*a*)

The Court held, that had the parties been equally blameable, the plaintiff could have had no title to the relief he sought. But the fact being such as to lead the Court to infer, the plaintiff being a ryot of the zemindar, that he must have been under some degree of pressure, and therefore not an entirely willing party to the transaction, which was entered into solely for the benefit of the zemindar,—the Court reversed the decree.(*b*)

Illegal cess.

If a zemindar takes upon him to grant or to assign an alleged right to collect an illegal cess from the occupying tenants, and the farmer of the Mehal collects it and keeps it to himself, the assignees of the zemindar cannot recover it from the farmer, although those who paid the cess have a right to sue the farmer for re-payment.(*c*)

Arbitrary and indefinite cesses which the ryot may agree to pay to the zemindar, cannot be recovered by suit:(*d*) but it is not so with definite and ancient cesses, specifically agreed to by the parties, and stated in the *cubooleeut*.(*e*)

Malikana generally means a percentage due to the malik or proprietor according to the custom of the country, it is the

(*a*) S. D. 1856, p. 774. (*b*) Suprà, Ch. I.
(*c*) S. D. 1852, pp. 4, 552. (*d*) Sel. Rep. s. 7, p. 142.
(*e*) S. D. 1857, pp. 1508, 1954; See Reg. V. 1812, s. 3.

remuneration of the zemindar; and surunjamee means deduction allowed to the zemindar for the charges and expenses of collecting the revenue or other incidental expenses.

Yet even on a tenure declared to be ryottee, a deduction may by custom be claimable under these names, though the use of the terms in this sense is peculiar.(*a*)

Where the administration paper prepared at the time of the settlement of an estate in the North-West Provinces, expressly provides that the lumberdar of the estate shall receive commission at a certain rate on the amount of rents collected by him, this right can be enforced by suit in the Civil Court.(*b*)

Contract relating to the disposal of voluntary payments.

Although payments may be in their nature voluntary, and not capable of being enforced by suit as against the payers or even as between one person who has received them from the payers, and another who thinks himself better entitled to receive them, yet they may form a legitimate subject of contract between the person who is in the habit of receiving them, and a third party. Thus, where a man has agreed with a cazi to receive the cazi's fees and pay him a fixed sum in lieu of them, he must pay the cazi(*c*) although the original payment of the fees is not compulsory.

The surplus of the income arising from offerings made at temples, may, after all proper and necessary expenses have been defrayed, be divided amongst the parties interested, in any manner that may be agreed to amongst themselves.(*d*)

Where a partnership exists between purohits, one of them may sue the others for his share in the profits voluntarily paid by jujmans or disciples.(*e*) And there may be similar suits between

(*a*) S. D. 1856, p. 61. (*b*) S. D. Agra, 1850, p. 464.
(*c*) S. D. 1853, p. 508. (*d*) S. D. 1856, p. 516. (*e*) S. D. 1857, p. 362.

the parties who may be entitled to the exclusive ministration at particular shrines, at certain times, for their several shares of the money actually collected at such shrines during the specified periods.(a)

Where, pending a suit as to the possession of a religious office, the matters in difference were referred to arbitration, and the parties appeared before the arbitrators, and voluntarily agreed upon terms of compromise, which were not reduced into writing, and the terms of the contract were afterwards partly performed, by the admission of one of the parties to the disputed office, the Court held the contract binding.(b)

Consideration involving breach of confidence.

If A, being agent to a landed proprietor, agrees for money to obtain for B a beneficial lease, this is an inducement to the agent to sacrifice his principal's interest to his own, and therefore the consideration is illegal, and the contract cannot be enforced by A against B.

But if the principal is informed by the agent of the advantage which the latter is to derive from the transaction, and thinks fit to recognize and sanction it, then the stipulation in favor of A is good, and may be enforced, for it formed part of the consideration which induced the principal to give B the lease.(c)

And if A agrees with B to procure a good purchaser for his land, upon condition that he shall receive a certain percentage on the price, he is entitled to the percentage if he fulfils his own part of the agreement.

A man may purchase lands in the name of another, either by private bargain, or at a sale in execution of a civil decree (which

(a) S. D. 1857, p. 733. (b) S. D. 1856, p. 512.

(c) Agra, 1852, p. 620.

is equivalent to a private sale) and he may bring a suit to enforce his rights as owner against his trustee.(a)

Purchase in false name.

Where land is sold by the Government for arrears of revenue, it is important to the public interests that the real purchaser should be known.(b) Hence there have been various laws enacted to enforce the registry of the true names of the purchasers at such sales.

No remedy if nominal purchaser retains.

The law at present in force(c) positively directs that any suit brought to oust the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs.(d)

Nor will that be permitted to be done indirectly, which cannot be done openly. Where(e) the purchaser of an estate sold for arrears of revenue, received from the defaulter a portion of the purchase money to be paid into the Collector's treasury by way of earnest, and agreed by deed to convey the estate to him on receiving the balance of the price, the Court refused to enforce the agreement, as this was virtually a purchase by the defaulter, who was prohibited by law from purchasing.

Nevertheless, as in such cases the money of the defaulter has been received by the nominal purchaser upon a consideration

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(a) Agra, 1856, p. 97. (b) S. D 1852, pp. 4, 552; See S. D. 1856, p. 277.

(c) Act I. of 1845 repealing and in substance re-enacting Act XII. of 1841. The law was the same between the enactment of Reg. VII. of 1799 and the year 1822 (Reg. XI.), and it seems that between 1822 and 1841 the like doctrine prevailed. See S. D. 1852, p. 651; and S. D. 1853, p. 961; and the case of Doe on the demise of Juddhoonath Chowdry v. Suttrojun Acharjee, Supreme Court, 12th Nov. 1858. Boulnois' Rep. v. 1, and *Hurkaru, Nov.* 17, 1858.

(d) Act I. of 1845, sec. 21. (e) S. D. 1852, p. 651; S. D. 1853, p. 961.

which has failed, it seems that the Courts will entertain a suit for the recovery of it.(*a*)

A and B, with money belonging to them in equal moieties, purchased land in the name of B: B allowed A to take possession and to receive his share of the rent, but never executed any conveyance to him of his half share, and after the death of both parties the representatives of B claimed to hold the land on their own account.(*b*)

The representatives of A being precluded by s. 21 of Act I. of 1845 from suing for their share of the land, brought an action against the representatives of B for a return of A's share of the purchase money. The Sudder Court held, however, that in the cases cited (Sel. Rep. v. 1, p. 289; v. 3, p. 24,) there was apparently a total failure of consideration for the money received for the plaintiff's use, but that in the case before them, there had been a substantial return in the rents admitted to have been received. and that there had not been a total failure of consideration. They therefore dismissed the suit with costs.

It is difficult to see the force of this reasoning. The consideration for A's original advance of one-half of the purchase money, was B's promise (evidenced by his subsequent acts) that he and his heirs would hold one-half of the property in trust for A for ever, or until A should take it over from him. That promise was kept, so long as A was permitted to receive his share of the profits, but it was violated when B's representatives set up an exclusive title. The promise could not be satisfied by a temporary compliance with A's terms, and therefore there was a

(*a*) Sel. Rep. v. 1, p. 289, v. 3, p. 24.
(*b*) S. D. 1858, 27th May, p. 1046; 5 Sevestre, p. 153.

failure of consideration, not totally, but in great part. The decision, however, was probably right, although for reasons other than those stated.

If A makes a nominal sale of his estate to B, in order to evade the process of Court which is about to be issued against him, and if B afterwards proves false to his trust, and holds the property for himself, A will not be aided by the Court to obtain restitution.(*a*) **Conveyance to defeat legal rights.**

Where one man has entrusted property to another, and the latter has failed to restore it, but has agreed to pay him the value of it, an action may be maintained upon such engagement, though the depositor may have subsequently taken criminal proceedings against the other in respect of the transaction.(*b*)

If the act of the defendant amounted to theft or any other heinous offence, properly punishable by the criminal law, public justice must in the first instance be vindicated, and the right of civil action is suspended until the party injured has performed his duty to society by an endeavour to bring the offender to justice;(*c*) and the Court not only will not enforce, but will regard as highly culpable, an agreement to compromise a prosecution, where the thief promises to restore the value of the thing taken, and the person who has been robbed undertakes not to prosecute the thief.(*d*) **Criminal breach of trust.**

A contract of hazard is a contract by which one of the parties to it, without contributing any thing, receives something from the other, not by way of gift, but as a compensation for the risk which he runs. **Contracts of hazard.**

(*a*) S. D. 1846, p. 120; S. D. 1849, p. 276; S. D. 1852, p. 838; S. D. 1856, p. 542; Agra, 1856, pp. 139, 474; S. D. 1851, p. 784; see however, S. D. 1858, p. 542.

(*b*) S. D. 1848, p. 94; 1849, p. 423. (*c*) S. D. Agra, 1852, p. 113.

(*d*) Con. 318, 7th July, 1820; see Sec. 7, Reg. XII. 1818.

As, where A engages, for a certain sum paid to him by B, to make good to B the value of his ship if it shall perish by shipwreck on a certain voyage, the promise of A is the consideration for the payment by B. Where A engages to pay B 100 Rupees, in case a certain horse runs the race, while B engages to pay A the like, or some other fixed sum, in case the horse does not run the race, the promise of A is the consideration for the promise of B.

Gaming.

A suit will not lie for recovering any sum of money or valuable thing, alleged to be won on a wager, or entrusted to any person to abide the event of a game, or on which a wager is made.(*a*)

Disguised wager.

It frequently happens that a transaction which at first sight seems to be one of ordinary mercantile buying and selling, turns out to be in effect a wager.

Where A(*b*) in consideration of 1,000 Rupees to be paid to him by B the day after the next Government sale of opium, engages to deliver to B a certain quantity of the opium which is to be disposed of at that sale; this is in effect a wager on A's part that the price of the opium will not exceed 1,000 Rupees, and a wager on B's part that it will exceed that price, and the intention of the parties is, that the party losing shall merely make good to the other the difference between 1,000 Rupees and the actual price of the opium, that is to say, that if the opium sells for 980 Rupees, A shall receive 20 Rupees from B, and if it sells for 1,020 Rupees, B shall receive 20 Rupees from A.

Here no consideration actually passes at the time, and it is not the intention of the parties that any money should ever pass between them, except the amount which shall eventually be lost or won.

(*a*) Act XXI. of 1848, s. 1. (*b*) S. D. Agra, 1848, p. 241.

A suit may be brought to enforce a contract of the kind called souda puttro, by which a man, actually receiving a sum of money by way of advance, engages to supply a certain quantity of an article of commerce at a time fixed, or, in case of non-delivery, to pay the value thereof at the price current at a stipulated period.(*a*)

Where there is no hazard there is no wager, although the nature of the obligation undertaken may in some degree depend upon an event which has not yet occurred. A man(*b*) who was the undoubted owner of one-half of a certain estate, and who was the claimant of the other half in an appeal pending before the Commissioner of Revenue, being indebted to another person in the sum of 1,800 Rupees, executed to him a deed of sale of one-fourth of the estate, and further entered into a written agreement, that if the appeal should be decided in his favor, he would execute a second deed of sale to him for a moiety of that portion also, otherwise the sale of the one-fourth was to be accepted by the creditor in satisfaction of all claims that he might have upon the debtor. **No wager where no hazard.**

It was held(*c*) that the debtor, upon the decision of the appeal in his favor, must execute a second bill of sale according to his agreement,—and that there was nothing in the terms of the deed which could render it a gambling transaction, within the meaning of Act XXI. of 1848, or otherwise illegal.

It is manifest that the creditor ran no risk; he was to receive, in satisfaction of his debt, a certain portion of land, and as much more, if the debtor had it to give.

A in consideration of an immediate payment of 1,000 Rupees assigned to B an overdue bond of C for 4,000 and interest; and

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(*a*) S. D. 1857, p. 118; S. D. 1857, p. 183; S. D. 1857, p. 189. See post, p. 49.
(*b*) S. D. Agra, 1852, p. 546; Ibid, 1853, p. 760. (*c*) Agra, 1852, p. 546.

bound himself to give B the means of proving the bond, and not to receive any portion of the debt himself, and engaged that if he should neglect to fulfil these conditions, he would pay the amount of the bond himself.

It was held(*a*) that this was not a transaction in the nature of a wager.

Contract repugnant to public policy.

It is considered to be injurious to the general interests of society to permit a man to engage that he will not exercise an useful calling at all. Thus if a fisherman were to bind himself to another, never to fish again, the contract would be void. But he may contract not to exercise his calling within certain limits.

One fisherman may contract with another, that he will not put up stakes for fishing within a specified distance of the stakes of the other.(*b*)

No claim to a monopoly, or an exclusive right to exercise any employment within a certain locality (e. g. that of supplying the residents of certain houses with flowers for religious ceremonies) will be listened to by the Courts.(*c*)

(*a*) S. D. 1852, p. 542. (*b*) S. D. 1856, p. 30. (*c*) S. D. 1857, p. 163.

CHAPTER IV.

OF THE EFFECT OF CONTRACTS.

Agreements have the force of law over the makers.

AGREEMENTS if originally legal, have the force of law over the makers of them: and they cannot be revoked except with the mutual consent of the contractors, or for causes which the law authorises. As an instance of the latter may be put the case —where A has contracted to send a cargo of saltpetre from Calcutta to B at Boston, and afterwards the exportation of that article from India to America is forbidden by the law of India.

All contracts and agreements must be executed with good faith.[1]

However clear the terms of a law may be, they are controlled by the particular arrangements which the individuals have chosen to make between themselves; and, as a general rule, the terms of a law cannot be relied on to justify a departure from an express agreement. Thus, the terms of Reg. VIII. 1819, s. 2, authorise Talookdars to let out their lands in putnee, that is, upon a perpetual lease at a fixed rent. But where A (a) having bought a Pergunnah at Public Auction, subsequently sold a 6 annas share to B, at cost price, upon condition that if B or his heirs should wish to sell the 6 annas share, they should dispose of it to none other than A or his heirs, who were to pay no more for it than the original cost price; (the object of the arrangement being to prevent the introduction of strangers into a property held "ijmalun," or by

(a) 6 Sel. Rep. p. 56.

coparceners whose shares had never been measured or distinctly separated from each other:) and B subsequently for a valuable consideration, let out in putnee part of the 6 annas share; the transaction was set aside as inconsistent with his agreement, notwithstanding the terms of Reg. VIII. 1819, s. 2, and notwithstanding that the putnee arrangement was not strictly a sale.

If a man is in wrongful (though peaceful) possession of another's land, and raises a crop on it without the assent or countenance of the owner of the land, the latter may oust him, and is not liable in damages for taking possession of the crop so wrongfully grown.(a)

But if the acknowledged manager and agent of the landlord has granted permission to a certain person to cultivate the land upon certain terms, and the land is cultivated and seed sown accordingly, the landlord cannot make a lease to another person, which shall have the effect of entitling him to interfere in any way with the growing crops which were sown upon the faith of the agent's permission.(b)

Even if a zemindar allows a man to occupy his land at a particular rent for more than 26 years, he is not thereby barred from dispossessing the occupant or enhancing the rent. Parties having no recognized engagement are mere tenants at will, and no lapse of time can interfere with the exercise of this right by the zemindar.(c)

Where a debtor having entered into an agreement with his creditor to discharge a debt by instalments, promises not to alienate any part of his property until the debt has been paid,—

(a) S. D. 1853, p. 53.
(b) S. D. 1845, p. 311.
(c) S. D. 1855, p. 589; S. D. 1851, p. 120.

if, notwithstanding this, a third party in good faith purchases property from the debtor, the latter may give the purchaser a good title, and the Courts will give effect to the sale: but the creditor is not any longer bound to exercise the forbearance stipulated for by the instalment deed.(*a*)

Stipulations considered repugnant to the policy of the Regulations.

It has been held, however, that a suit cannot succeed in the Civil Courts, if its object be considered repugnant to the policy of the Regulations, though not expressly forbidden by any of them.(*b*)

Thus, with respect to mortgage securities affecting land, it has been laid down, that the policy of the Regulations has been less to facilitate the pledge of land, than to protect the borrowing landholder against the lender, as some compensation to the former for the stringency of the Revenue Regulations; and that they do not sanction in any case the transfer of immoveable property in satisfaction of a debt, without the intervention of public authority, unless such transfer be made by the direct and immediate act of the proprietor himself.

For this reason, where an estate in the Mofussil had been sold by a mortgagee in satisfaction of the mortgage debt, by virtue of a power of sale contained in the instrument of mortgage (which was framed in a manner well known to the English law,) the Civil Court dismissed a suit brought by the purchaser against the mortgagor for possession of the land.

But it must be observed that an agreement, fairly entered into by persons of full age, and on the faith of which one of them had lent his money, was here set aside on a mere arbitrary view of public policy. And not only so, but the peculiar view taken by

(*a*) S. D. 1855, p. 353.
(*b*) Civil Procedure, 3rd Ed. p. 47; Macpherson on Mortgages, 2nd Ed. p. 34.

the Court was probably wrong in itself, inasmuch as it is generally found that money can be borrowed easily, in proportion to the goodness of the security which can be given for its repayment, and the power of speedy realisation by sale would necessarily enhance the value of the security.

The nature of the contract between a putneedar and his zemindar is such, that if the rent is not paid, the putnee tenure becomes liable to sale.(a)

A *cubooleeut* appears to be no more than a recognition of the possessory right of the person to whom it is given.(b)

A ryot, in general, (not holding one of the tenures referred to in Act I. of 1845, s. 26, nor having given a bonus for his holding, and thereby obtained a right in the property to that extent) has merely a right of occupancy so long as he pays his rent, and not a transferable tenure.(c)

Of contract between vakeel and client.

In the contract of hiring between a vakeel and his client, the former is understood to engage that he will use proper skill and diligence in his client's affairs, and he is liable to an action for damages(d) on default. In like manner, a surgeon is bound to exercise competent skill in the treatment of his patient, a farrier to shoe a horse without laming him, a goldsmith to set a diamond without breaking it, and every man who undertakes a duty, to use diligence and care in the performance of it.

Where a man makes two inconsistent contracts.

If a man has contracted with two persons in succession, to deliver to each of them a thing purely moveable (e. g. if he has sold a horse to one, and before delivery sells it again to another), that one of the two who has been put in actual possession

(a) S. D. 1845, p. 418. (b) S. D. 1856, p. 414.
(c) S. D. 1855, p. 14; S. D. 1853, p. 536; Con. 890, Reg. VII. of 1799, s. 15, cl. 7.
(d) S. D. 1855, p. 355; C. P. Reg. XXVII. of 1814, s. 12.

of it is preferred, and remains proprietor, although the contract with him was subsequent to that made with the other,—provided, however, that the possession be in good faith, which it is not if he knew of the prior sale.

The obligation of giving imports that of delivering the thing, and of preserving it up to delivery. Duties connected with obligation of giving.

A person who is obliged to give any thing to another, is bound to give it to him, or to some one authorised on his behalf, at a suitable time and place.

Where the object of the obligation is a specific thing, the obligation has the further effect of obliging the debtor to use a proper degree of diligence in the preservation of it until it is delivered.

CHAPTER V.

DAMAGES.

What are damages.

WHOEVER contracts to do or not to do a particular thing, and afterwards fails to perform his contract, is liable to pay damages,—that is, to make compensation in money to the other party, for the loss which he has sustained or the gain which he has missed. And it makes no difference whether the contract(*a*) does or does not contain an express stipulation to that effect.

Besides damages for non-performance, the person wronged may in many cases obtain a decree that the other party shall specifically perform the agreement.(*b*)

Where one party may perform contract at expense of the other.

The person with whom the contract has been made, may (if he can,) in case of non-performance, procure for himself the execution of the contract at the expense of the other party. Thus, if it has been agreed that a vessel shall sail at a particular hour, and she starts before the hour, a person who has contracted for a passage in her may hire another vessel in order that he may overtake her, and the party who violated the contract must bear the cost. So, if the contract is, to deliver certain goods at a fixed time, and they are not delivered accordingly, the party to whom they are to be delivered may supply himself with similar goods in the market, and charge the other party with the price.

Breach of negative obligation.

If the obligation is *not to do* some act, the doing of that act by the person who has undertaken not to do it, at once makes him liable in damages.

(*a*) See Agra, 1852, p. 600.　　(*b*) See Code of Civil Procedure.

Damages are due when the contractor fails to fulfil his obligation within the time specified, and also when, although no time was specified, the thing which he has bound himself to give or to do cannot be given or done but within a certain time which he has suffered to pass by.

Consequences of delay.

A contractor is liable to the payment of damages either by reason of the non-performance of the obligation or by reason of delay in its execution,—even although there is no bad faith on his part,—if he cannot prove that such non-performance proceeds from causes wholly foreign to himself.

Inevitable loss.

It is not equitable to hold a man responsible for the loss of property from causes beyond his own control, or from his own acts done in good faith and without negligence; as where an agent or executor has lost the property committed to him, by inevitable accident, or destruction by fire, or by robbery or the like; or where that which he contracted to do has since the contract become illegal, as in the case already (*a*) put, where a man has contracted to deliver an article for exportation, and such exportation has subsequently been prohibited by law; or where he agreed to take in a cargo at a certain port, and war was afterwards declared with the country in which the port was situated, so that he could not trade there.

Contingency which might have been provided against.

But where the contingency was such that the party might, by his contract, have provided against it, and he has not done so, and thus has led the other party to presume that he has taken the risk upon himself and assumed a general and unqualified liability, he must be held liable accordingly, for the terms would probably not have been so favorable to the contractor if he had made any exception.

(*a*) p. 41.

And therefore in matters of positive contract and obligation created by a man himself, it is no ground of defence, that he has been prevented from fulfilling them by accident, or that he has been in no default, or that he has been prevented by accident from deriving the full benefit of the contract on his side.

Thus if one contracts to deliver to another a certain article of merchandise at a certain price, at a given time and place, the Court will make the former pay damages for the non-performance of the contract, although the goods may have perished by shipwreck, or although they were not procurable at the place which both parties had in contemplation.

Consequences of gross negligence.

It need scarcely be added that the Court will not grant relief upon the ground of accident, where the accident has arisen from a man's own gross negligence or fault, or the gross negligence or fault of his agent.

Measure of damages in cases of contract.

The damages due to him who is injured by breach of contract are, in general, (as has been said above) the amount of the loss which he has sustained or of the gain of which he has been deprived.

A person who claims compensation by way of damages for the violation of an agreement ought to be prepared (where the case is not one of a mere money demand as to the amount of which there can be no doubt) to prove specifically the extent of his alleged loss.(a)

Market value.

A contracted to deliver a certain quantity of saltpetre to B on or before a fixed day, and received a sum of money by way of earnest. He afterwards sold the saltpetre to a third party. B recovered a sum equal to the profit he would have made by immediate re-sale of the goods if they had been duly delivered—*i. e.*

(a) S. D. 1845, p. 85; S. D. 1848, p. 817.

the market value of the goods at the time and place at which they ought to have been delivered.(a)

By a contract commonly known as soudaputtro,(b) A bound himself in consideration of 21 Rupees advanced to him by B on the 15th Sawun 1256 B. S., to supply to B 21 maunds of *tethoor*, or hooley powder, in the following Poos, or in default thereof to pay to B the value of that quantity of hooley powder, at the current selling price of the article in the month of Phalgoon. A having failed to deliver the powder stipulated, an action was brought for 42 Rupees, being the current price of 21 maunds of hooley powder in Phalgoon. **Contract of soudaputtro.**

It was contended that this transaction (which took place previous to the repeal of the usury laws) was usurious and prohibited by Sec. 9, Reg. XV. of 1793; but the Sudder Court held it to be clearly a contract to supply a certain article of trade at a particular time, in order to enable the person making the advance, to take advantage of an expected rise in the price at a particular season,—and the contract was enforced.

A man agreed, on certain terms, to furnish another with a quantity of indigo seed, at a specified rate. The seed was not supplied, and the person entitled to receive it, was obliged to buy other seed in the market at a higher rate. He was held entitled to recover, by way of damages, the difference between the market rate and the rate at which he ought to have been supplied.(c)

If the delivery was not to take place in some spot where the article in question could be readily sold to the best advantage, the price of the article in the Calcutta market (or whatever is the nearest large ordinary market which may be taken to have

(a) S. D. 1847, pp. 345, 193; Agra, 1852, p. 600.
(b) S. D. 1857, p. 118; Supra, p. 39. (c) S. D. 1847, p. 321; S. D. 1848, p. 590.

been in the contemplation of both parties) at the time fixed for delivery, after allowing for the usual charges and risks of transport to such market, seems to be the correct measure by which damages in such a case ought to be settled.(a)

If the owner of a boat agrees, for a certain sum, to take a cargo to a certain place, starting at a fixed time, and the boat does not start at the time appointed, whereby the arrival of the cargo at its place of destination is retarded,—and if in the meantime the price of the article falls,—the owner of the boat must pay the difference between the market price of the cargo at the time when it would have arrived if forwarded in due course, and its actual value when it did arrive.(b)

Freight.

Where a man has engaged freight for certain articles in a certain ship, and the owner of the ship violates the contract,—if other freight, equally good could have been obtained at the same time and place, the measure of damages would probably be the difference between the hire originally agreed upon, and that which the shipper has been obliged to pay for the substituted freight.(c)

Delays, &c. of carrier.

A boat owner agreed(d) to carry a cargo of lime to Calcutta for sale, and he received the freight in advance. The boat was loaded and proceeded towards its destination, but, under circumstances which the Court considered to afford no sufficient excuse, the owner of the boat landed the cargo at an intermediate station and sold it on the spot, though uninjured, aud accounted to the merchant for the proceeds.

The Court held that the contractor was bound under his engagement to carry the lime to Calcutta, or to find a proper boat to

(a) S. D. 1851, p. 754; S. D. 1853, p. 422; S. D. 1858, p. 905.
(b) S. D. 1846, p. 246. (c) S. D. 1858, p. 905. (d) S. D. 1852, p. 849.

carry it there, and that he was liable to pay the difference between the sum for which the lime was actually sold, and the price which ruled at Calcutta.

Where money has been paid under a contract which has never been completed, the payer is entitled to recover.

Money paid under contract not completed.

A agreed with B to pay a certain sum, and B agreed with A to grant him a putnee lease on certain terms, and a sum of money was paid by A to B by way of deposit in part of the consideration money.

A not having paid any more money, and B not having granted the putnee lease, or tendered it to A (either before or after suit brought), or given him notice of his intention to consider the deposit forfeited if he did not take up the lease on the terms agreed to, A was allowed to recover his deposit with interest from the date of the institution of the suit.(*a*)

Where one man sold a garden to another and received a sum of money by way of earnest, but afterwards repudiated the contract, the purchaser obtained a decree for the repayment of his earnest money.(*b*)

If one man advance money to another on the security of a lease (bhurna) of land, granted to him by the latter, by means of which he is to repay himself,—or on the security of a mortgage of any other kind,—the lender if he is afterwards dispossessed by the borrower contrary to the terms of the contract, is entitled to demand at once the repayment of his money.(*c*)

A granted to B(*d*) a putnee lease of certain land, at a fixed rent to be paid to A by B, who on the other hand was to be entitled

(*a*) S. D. 1856, pp. 840, 491; 4 Moore's Ind. App. p. 444.
(*b*) S. D. 1852, p. 566. (*c*) S. D. 1852, p. 193; S. D. 1853, p. 62.
(*d*) S. D. 1853, p. 577.

to collect the "mofussil" (local) rents from the occupying ryots during the whole period for which he was himself to pay his putnee rent. B paid his putnee rent for the first year to A, and it afterwards appeared that the mofussil rents for that year had been collected by A's gomashta, who embezzled them. B sued for and recovered from A the putnee rent which he had paid.

Recovery of passage money.

A ship(*a*) bound from Moulmein to Calcutta, commenced her voyage and got as far as Amherst, but was prevented from going any further by springing a leak. She tried to get back to Moulmein for repairs, but was wrecked on the way. Certain persons, who had engaged and paid for their passage in her from Moulmein to Calcutta, and who might have embarked at Moulmein if they had thought fit, but who had not done so, and who intended to join the ship at Amherst, sued to recover the passage money which they had paid, but they were held not to be entitled to repayment. And it was laid down, in accordance with an English decision, that where a ship is lost (as it was in this case) after the commencement of the voyage, the passage money, if paid, cannot be recovered,—although it may be recovered if the ship be lost before the commencement of the voyage for which the parties have contracted.

Where contracts made profitless by one party.

And if one party has by his own fraud made the contract profitless to the other party, he cannot claim damages if the other withholds from him the advantages he stipulated for.

A man hired(*b*) a ship at a certain sum monthly, and it was provided by the charter party that the owner should at his own cost keep her in good condition and well found; and that the charterer should restore her to the owner at Chittagong.

The vessel was in bad condition, and the charterer was obliged to repair her at his own expense in two different ports, and after

(*a*) S. D. 1853, p. 948. (*b*) S. D. 1849, p. 433.

all was not able, owing to her bad condition, to make the port for which she was bound, nor to derive any profit from the use of her, but brought her to Calcutta, put her into dock, and delivered her to the owner.

The Court held that the owner had no claim whatever upon the charterer, for any portion of the period during which the vessel remained in his hands.

Where one party deprives the other of evidence.

Where one party has by his own act deprived the other of the means of proving the amount of his loss, the Court will adopt that presumption which is most favorable to the complainant. Thus, if a man should find a diamond and take it to a jeweller to ascertain its value, and the latter should refuse to restore or even to produce it, tbe Court would presume that the diamond was of the first quality, and would give damages accordingly.(a)

Certain persons(b) carried on indigo cultivation in their fields, under engagement with, and advances from, a planter, and their engagement bound them positively to indigo cultivation for two years, and provided that it should be optional with the planter in the third year to take as much of the indigo land as he pleased, with the *koontee* crop thereon.

The cultivators having before the close of the second year rooted up the standing crop and cultivated the ground on their own account for a new crop, it was held that the planter was entitled to compensation for the gain he might have made if the option had been left to him as agreed upon.

Where one induces the other to break contract.

If one of the parties to a contract tempts or inveigles the other into a breach of the contract, and then seeks to take advantage of the breach, he will not be allowed to do so, because he has virtually

(a) See S. D. 1856, p. 988; 7 Sel. Rep. p. 263. (b) S. D. 1850, p. 419.

consented to the act of which he complains. But it is no answer to an action to say that the father of the plaintiff countenanced the breach, unless the father can be shewn to have been acting in collusion with his son.(*a*)

What surety may recover from principal.

A surety may sue his principal for the amount of the loss he has sustained through the suretyship.

For instance, if the land of the surety has been pledged as security and has been sold, he may sue for the amount of the price it fetched in the market.(*b*)

How value to be ascertained.

Where the article, in respect of which there has been a breach of contract, cannot be said to have any market value, the cost of its production may aid the Court in determining the amount of damages, which ought never to be assessed upon a mere guess.(*c*)

Breach of contract to be performed at a future time.

Where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by contract, and they impliedly promise that neither will in the interval do any thing to the prejudice of the other, inconsistent with that relation.

Thus, a contract to marry on a future day, may be considered a contract to continue unmarried until then, and a contract to sell and deliver specific goods on a future day, is a contract not to part with the ownership of them before that day, and although it is barely and remotely possible that a man may marry intermediately, and by the death of his wife be able to marry according to the words of his original contract, or that he may repurchase the goods and be ready to deliver them upon the day fixed, yet

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(*a*) See S. D. Agra, 1857, p. 1. In this case, the Court remarked that even the instigation of the son would have afforded no defence, which is clearly wrong.

(*b*) S. D. 1856, p. 78. (*c*) S. D. 1851, p. 197; S. D. 1853, p. 844.

the intermediate marriage or sale is justly considered as a renunciation of the contract. And so a party to any agreement, of which the performance is deferred, may, before the time for execution has arrived, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract: and an action will lie for such breach at the option of the injured party, either immediately upon the breach or renunciation, or when the time for the fulfilment of the contract has arrived.

Distinction between immediate and consequential damages.

When a man cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements; he is only liable for the damages which were foreseen or which might have been foreseen at the time of the contract; for to such alone the debtor can be considered as having intended to submit.

In general, the parties are deemed to have contemplated only the damages, with interest, which the party with whom the contract is made might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such damages as may have been incidentally occasioned thereby in respect to his other affairs: the other party is therefore not answerable for these. For instance, suppose I sell a person a horse, which I am obliged to deliver in a certain time, and I cannot deliver it accordingly. If in the mean time horses have increased in price, whatever the purchaser is obliged to pay (more than he would have given for mine,) in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is damage sustained entirely because I did not deliver the horse, and one which I might have foreseen,—the price of

horses, like that of all other things, being subject to variation. But if this purchaser was a zemindar, who for want of having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the Collector's Office in time to pay his Government revenue; and his estate has been sold in consequence, I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation. For this is a damage which is foreign to the obligation, which was not contemplated by me at the time of the contract, and to which it cannot be supposed that I had any intention to submit.

The party who has failed to perform his contract, may however be liable for the damages sustained by the other, although extrinsic,—when it appears that they were contemplated in the contract, and that the party submitted to them either expressly or tacitly, in case of the non-performance of his obligation. For instance, I sell my horse to a zemindar and there is an express clause in the agreement, by which I am obliged to deliver it to him, so that he may arrive at the Collector's Office in time to pay the Government revenue. If in this case I make default in discharging my obligation, though without any fraud, and the zemindar could not either get another horse or any other conveyance, I shall be answerable even for the extrinsic damages arising from the loss of his estate.

The principle upon which this doctrine is founded, is that the obligations which arise from contracts can only be formed by the consent and intention of the parties. Now the party in subjecting himself to the damages which might arise from the non-performance of his obligation, is only understood as intending to oblige himself, as far as the sum to which he might reasonably expect

that the damages would amount at the highest; but he could not be expected to undertake a risk wholly unknown to him.

The breach of a contract of a very ordinary and trifling nature may, in the event, involve very important consequences to the party injured. Thus by the railway train arriving a few minutes too late at a particular station, a merchant may be deprived of the means of reaching his ultimate destination that day, and so be prevented from being present at a particular fair where he has important business to transact. So, through the non-delivery of goods by a carrier at the proper time, the owner may lose a most advantageous opportunity of disposing of them, or be prevented from using them at a time when the goods are much wanted in his own trade.

Special circumstances should be stated at the time.

Such special circumstances, if they exist, ought to be communicated at the time of making the contract, in order that the parties may choose what risks they will incur, and may not be made liable for extraordinary damages through the breach of what appears on the surface to be an ordinary, or perhaps trifling, contract.

Remote consequences of breach.

The remote consequences of a breach of contract cannot be taken into account. Where the purchaser of goods resells them before the time fixed for their delivery, and the original seller fails to deliver them, the damages recoverable by the original purchaser will be restricted to the difference between the contract price, and the market price at the date of the breach of contract. He will not be entitled to recover the amount of the claim, if any, enforceable against himself by the third party for breach of contract, because immediately on receiving notice of the breach of the original contract, the original purchaser ought to have supplied himself with the article in question, in order to be able to deliver it to his own buyer.

It may happen, however, that if goods are not delivered or accepted according to contract, time and trouble may be required, as well as expense incurred, either in getting other similar goods, or in finding another purchaser, and the damages ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for.(*a*)

Action against purchaser for not accepting goods.

In an action at the suit of the vendor of merchandise against the purchaser for not accepting it, (a case which occurs often when the article falls in value between the date of the purchase and the time fixed for delivery,) the measure of damages will similarly be determined, by reference to the contract price and the market price at the time of refusing to accept the goods. Thus if A contracts for the purchase of goods to be delivered at Calcutta as soon as vessels can be obtained for the carriage thereof; and subsequently, the market having fallen, A gives notice to the seller that he will not accept the goods, then being in transit to Calcutta;—in an action against A for not accepting the goods the proper measure of damages is the difference between the contract price, and the market price on the day the goods may have been tendered to A for acceptance at Calcutta and refused.

A vakeel who is employed without any special agreement for remuneration, is entitled to his fees at the rate prescribed by law, although the client may have been obliged to pay the legal fees to other vakeels, and might have had their services without further fees if he had chosen to continue them in his employment.(*b*)

Damages in cases of fraud.

Even in cases where the non-performance of the contract results from the fraud of one of the parties, the damages and interest

(*a*) See supra, p. 50, as to freight.

(*b*) S. D. 1852, p. 854; as to the damages recoverable against a pleader for neglect of duty, see S. D. 1855, p. 355.

must not comprehend,—as regards the loss sustained by the other party, and the gain of which he has been deprived,—any thing which is not the immediate and direct consequence of the non-performance of the contract.

The defaulting contractor is no doubt liable in case of fraud, for all the damages which the other has suffered in consequence of his fraud; not only for those which he may have suffered in respect of the thing which is the object of the contract, but for all damages in respect of anything arising out of it, without reference to any question whether the party could be presumed to have intentionally subjected himself to them or not. For a person who commits a fraud obliges himself, whether he will or not, to the reparation of all the injury which it may occasion.

For instance, if a person sells to a farmer a cow, which he knows to be infected with a contagious but hidden distemper, and purposely conceals this fact from the purchaser, such concealment is a fraud on his part, which renders him responsible for the damage which the other may suffer, not only in respect of that particular cow, which is the object of his original obligation, but also in respect of the purchaser's other cattle, to which the distemper is communicated,— for it is a fraud of the seller which occasions this damage. But it is difficult to appreciate the exact importance of every circumstance in a long chain of events: and the Court would probably decline to pursue the subject further, and to make the defaulter pay for all the possible consequences to a farmer of the loss of his cattle, which might involve perhaps his utter ruin.

Damages for breach of money-contract.

Where the contract is only to pay an ascertained sum of money, the computation of damages is very simple, for the amount which would have been received if the contract had been kept, is the measure of damages if it be broken. This rule applies to

all actions for damages on account of non-payment of money due on a bond, or a bill of exchange or promissory note, or for the price of goods sold and delivered, or for money due upon the adjustment of an account. In such cases the creditor is not obliged to prove any loss.

Interest.

Where the rate of interest is stipulated between the parties, the specific contract should be strictly enforced; but where no specific stipulation exists, the Court may exercise a sound and equitable discretion in respect of the rate to be awarded.(*a*)

Interest is allowed(*b*) on the balance of a cash account, as well as on a bond debt, unless for valid reasons, to be assigned in each case, the Court shall see fit to disallow the interest. This is according to established custom, on which the written law in regard to interest is avowedly founded.

Act XXXII. of 1839 (extending to India the Statute 3 and 4, Wm. 4, c. 42, s. 28) was intended mainly to provide for payment of interest on shop bills and debts of that description, on which interest was not demandable in the absence of a specific agreement. The Act provides that "upon all debts or sums certain payable at a certain time or otherwise, the Court before which such debts or sums may be recovered, may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument, at a certain time," "or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until

(*a*) S. D. Agra, 1855, p. 22; Cir. Ord. No. 202, 5th May 1837.

(*b*) S. D. Agra, 1851, pp. 179, 335, 370.

the time of payment; provided that interest shall be payable in all cases in which it is now payable by law."

In the absence of any special agreement, interest on shop bills only runs from the date when payment is demanded.(*a*)

In an action to recover the price of timber purchased by defendant from plaintiff, the Court finding that the debt was not payable by virtue of any written instrument, and that no demand intimating that interest would be claimed, was ever made in writing, refused to allow interest.(*b*)

A man who, after having sold his land for a fixed price, withholds possession, and continues in the receipt of the rents, cannot recover interest upon the unpaid purchase money for the period during which he so continues in the enjoyment of the profits.(*c*)

The Courts will not decree any compound interest, except as arising from intermediate adjustment of accounts, and not even in that case, except when new bonds or agreements are taken.(*d*)

The rule with regard to the adjustment of interest on bond debts is (*e*) that all sums, whether principal or interest, which may be credited to the debtor, should be applied first to the liquidation of the interest due by him, and the surplus only carried to the reduction of the principal. Application of payments on bond debts.

Where a sum of money is ordered by a decree to be paid to a party,—whether it consists of principal money only, or of principal and interest, or of wasilat or mesne profits,—interest is allowed upon the whole sum decreed, from the date of the decree until the money shall be actually realized.(*f*)

(*a*) S. D. 1850, p. 314. (*b*) Agra, 1850, p. 51. (*c*) Agra, 1850, p. 343.
(*d*) Reg. XV. 1793, s. VII.; S. D. 1852, pp. 556, 1021.
(*e*) S. D. 1856, p. 1024; S. D. 1853, pp. 641, 681.
(*f*) Cir. Ord. 11th September 1827, 11th January 1837, 12th August 1842; S. D. Agra, 1856, p. 540.

Interest on arrears of rent.

Where there is no express stipulation in a lease that interest shall be payable on arrears of rent, the Courts, in exercise of the discretion given to them by Act XXXII. of 1839, will, as a general rule, not give interest on the balance previous to the date of suit, where a party has not proved that he made any demand for rents upon the tenant, and has not accounted for the delay which has taken place in realising his rents by summary process.(a)

Liquidated damages.

When the agreement imports that he who shall fail in executing it shall pay a certain sum by way of compensation, and the Court considers that the intention of the parties was only to ascertain the damages, and not to constitute a penal obligation, there can be allowed to the other party neither a greater nor a less sum than the sum so fixed, which is commonly called liquidated damages.

Penalty.

A penal obligation is created where a person, merely in order to assure the performance of an agreement, binds himself to something in case of non-performance.

A penal obligation being in its nature only accessory to the principal obligation,—if the principal obligation be invalid, the penal clause is null, as there ought to be no penalty for the non-performance of an obligation which it is not proper or not possible to execute.

But the principal obligation depends wholly upon itself, and may be good, although the penalty attached to its non-performance be a nullity.

Though one man cannot (without being duly empowered) enter into a valid undertaking for the act of another, so as to bind that

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(a) S. D. 1852, p. 508; S. D. 1853, p. 775; S. D. 1855, pp. 207, 330; S. D. 1856, p. 653; see more upon the subject of the allowance of interest by the Courts,—Civil Procedure, 3rd Ed. Chapter XXXV. Sec. III. pp. 528, 529; see also, Ch. X. p. 103.

other, yet he may bind himself to procure the act to be done: and therefore a penal obligation, added to an agreement by which one has promised for the act of a third person, is valid, as in the common case of bail.(a)

The object of the penal clause is to secure the performance of the principal contract, and therefore the creditor on default is allowed to sue for the performance of the principal obligation, in lieu of demanding the penalty.

But where liquidated damages are stipulated for, they are considered to be substituted by the parties for all the benefits of the principal contract.

The subject of penal clauses and liquidated damages, is one of much delicacy.

Distinction between them.

On the one hand, it is held that where the parties have agreed to adopt a certain measure of damages for the loss which will be sustained through an infraction of the agreement,—such loss not being in itself capable of being very exactly estimated,—their terms ought to be enforced by the Court.

As in an English case, where a surgeon sold to another surgeon the good-will of his business, and stipulated that if he himself should attend any patient within a certain district, he would pay the other a fixed sum as liquidated damages. It was held that the consequences of any such infraction of the agreement might be indefinite damage to the business which was thus made over. The parties had done well to fix the measure of damages, and really meant that the fixed sum should be paid, and therefore it must be paid. For the intention of the parties manifestly was that if there was a single breach of the contract in any particular,

(a) See supra, p.

the entire contract should be at an end, and that the sum stated should be paid for the loss of the whole.

In the case of a common bond with a penal obligation, (in the English form, well known in India) given on a loan of money, the English Courts in early times, gave relief to the obligor who could indemnify the obligee by the payment of principal and interest. And they have extended the same principle to covenants where the damages stipulated for breaches of the covenant were very large in amount, and have held that the parties only intended that the sum really due should be recovered. But the tenor of the later decisions is, to restrict the operation of that principle, because it militates against another great and governing principle of law, that parties may make what contracts they please,—within the limits of the law,—and that such contracts shall be carried into effect by the Courts according to the intention of the parties, which is to be learnt from the language of the contract itself.

Where upon an attentive consideration of the contract, the Court is of opinion, that the object of the parties is really only to fix an amount by way of penalty, as a security for performance of the principal obligation,—in such cases the Courts of this country(*a*) as well as those of other countries, hold that "as the penalty is designed as a mere security, if the party obtains his money or his damages, he gets all that he expected, and all that in justice he is entitled to. In reason, in conscience, and in natural equity, there is no ground to say, because a man stipulated for a penalty, in case of his omission to do a particular act (the real object of the parties being the performance of that act), that if he omits to do the act, he shall suffer an enormous loss,

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(*a*) S. D. 1857, pp. 101, 105; see S. D. 1851, p. 477.

wholly disproportionate to the injury to the other party. If it be argued that it is his own folly to have made such a stipulation, it may be replied that the "folly of one man cannot authorise oppression on the other side."

In all such cases, the Courts use an equitable discretion and award damages in proportion to the injury really caused by the breach.

A, having a doubtful claim on B for 33,000 Rupees, agreed with B to reduce his claim to 25,000 Rupees. This sum B undertook to make good by certain instalments payable on fixed dates, and it was stipulated that if default should be made by B in payment of any instalment at the due date, B should again become liable to pay the 33,000 Rupees. The Sudder Court regarded this penal clause as a mere security for the payment of the 25,000 Rupees.(a)

If the covenant relates to matters which are not of an uncertain nature and amount, as where the covenant is for the payment of a smaller sum, and the damages named in the deed are a much larger sum, the sum stated is to be regarded as a penalty.

When some of the stipulations in the covenant are of a certain nature and amount, and some are of an uncertain nature and amount, as the sum could not be treated as liquidated damages in respect of some of the stipulations, it ought not to be so treated in respect of the others.

If a party agrees to pay 1,000 Rupees on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty, and not as liquidated damages. But if there be a contract consisting of one or more stipulations, and the damages arising out of the breach of all the stipulations cannot be measured,

(a) S. D. 1857, p. 101.

then the parties must be taken to have meant that the sum agreed on was to be liquidated damages, and not a penalty.

Contracts relating to indigo.

Under certain acts of the Legislature of India, where a planter has made advances to a ryot for indigo cultivation, and the latter is prevailed upon by others to break his contract, the planter can obtain damages from him, and from those others, to the extent of the injury sustained. And he can get no further damages, even although the written engagement of the parties may have expressly provided a higher penalty.(*a*)

If(*b*) the failure of a ryot or other contractor to execute the stipulations of his agreement, by the delivery of indigo plant in the manner stipulated, be owing to accident, or to any cause not implying fraud or dishonesty, the penalty to be adjudged against such ryot or contractor shall not exceed three times the sum advanced as the consideration for his contract, including interest.

It is erroneous to limit the damages to the sum actually advanced by the planter, for this would be equivalent to declaring that the entire price of the indigo contracted for shall be paid to the ryot in advance, a condition which would be most unjust and ruinous to the planter.

Liability of heirs of contractor.

An action for damages arising out of the breach of an obligation under an express or implied contract or quasi contract, the performance of which by the deceased in person was not an essential ingredient of the contract, can be brought against the representative of the deceased, and they can be made liable so far as they have assets of his.(*c*)

(*a*) S. D. 1848, p. 736; Act XVI. 1835; Act X. 1836; S. D. 1847, p. 190.

(*b*) Reg. VI. of 1823, cl. 4, s. 4; S. D. Agra, 1852, p. 126; Agra, 1854, p. 582; S. D. 1852, p. 851. But see Agra, 1851, 13th February; S. D. 1853, p. 720.

(*c*) S. D. 1858, p. 54.

CHAPTER VI.

INTERPRETATION OF CONTRACTS.

Object of rules of interpretation.

THE object of all rules of interpretation is to ascertain the true intention of the parties to a contract; and this is to be gathered from a careful consideration of all the surrounding circumstances, as well as of the words used by the contracting parties to give expression to their meaning.

Some extrinsic evidence generally required.

An agreement in writing is not, as a general rule (except in cases of the transfer of bills, bonds and other securities for money) entirely self-contained or independent of extrinsic circumstances. Thus in the very simplest agreements,—as if A sells to B "all the rice which is now in my golahs or granaries at C"—or lets to him "my field by the river, which I have inherited from my father," or "all my zemindary in zillah N,"—in all these cases, extrinsic evidence, more or less particular, must be resorted to, in order to ascertain to what property the contract applies. That is to say, it must be learnt from some sources extrinsic to the document itself, which is the golah of the vendor, which is the field he inherited, or which the zemindary. If in the course of the extrinsic inquiry we are led to entertain some doubt not suggested by the terms of the contract itself, as to what the parties really intended to express, we may inquire further. It may be, for example, that in the instance put, the lessor inherited from his father two distinct and separate fields, and in that case it must be ascertained, which of them he intended to let. Again, the general rule is, that a lease of land passes every thing

Latent ambiguity.

that is growing on it. But it sometimes happens that the fruit trees are habitually let separately from the land, or even that they belong to a person who is not owner of the land.(a) It may hence become necessary to inquire whether it was the intention to include them or not in the lease. If it were proved that the soil was usually let apart from the fruit trees, and that the former lease had just expired, and that the land was relet upon the old rent, it would be difficult to believe that the trees were included. Again(b) if the contractor had no zemindary in zillah N, but had a zemindary in zillah M, evidence might be admitted to shew that this was the zemindary which he intended to designate.

Extrinsic evidence in explanation.

Inquire what has been agreed upon, not what ought to have been.

The question always is, what is the meaning of the words of the contract, not what ought to have been their meaning. If they are clear in themselves, and there are outward objects to which they will apply, it is not lawful to adduce evidence to shew that a man who has said one thing ought to have said another. If, for instance, the contractor has a zemindary in zillah N, it is not open to any one to shew that he ought to have contracted, or that he intended to contract, to sell his zemindary in zillah M. Evidence explanatory of what the party has written is admissible, but not of what he intended to have written; for to admit evidence of what he intended to have written is really to set aside the writing which the parties themselves have been content to adopt as the best proof of their intention.

The spirit rather than the letter is to be observed.

In construing agreements it is necessary to search into the mutual intention of the contracting parties, as evidenced by the language made use of, rather than to stop at the literal sense of the terms employed.

(a) See S. D. Agra, 1852, p. 549. (b) See S. D. 1852, p. 61; S. D. 1853, p. 242.

When a clause is susceptible of two meanings, it must be understood in that according to which it may have some effect, rather than in that whereby it cannot produce any. And no part of a document ought to be rejected as insensible, if it is possible to put a reasonable construction upon it. Documents should not be construed so as to be insensible.

Expressions which bear two meanings must be taken in that sense which agrees best with the subject matter of the contract. How ambiguous expressions are to be construed.

Whatever is ambiguous must be interpreted according to the usage of the country where the contract is made; for instance "so many biggahs of land" means so many biggahs according to the standard of the district.(a) Usage of the country.

It is the custom,(b) and is a matter of notoriety in Behar that dakhilee (subordinate or included) villages, included in uslee (original) villages, are reckoned one and the same with their uslee villages and are not divisible in transfer. So that by a general description of the villages, both uslee and dakhilee would pass.

Where a man(c) held a lease of land, at a fixed rent "nominally for the cultivation of indigo," but neither the lease itself, nor the *cubooleeut* or counter-part signed by the tenant, contained any prohibitory stipulation, the tenant was held to be entitled to raise a second crop, of a different kind, without paying additional rent. It would have been different if any custom or usage respecting the cultivation of the soil, and the mode of husbandry, adverse to the exercise of this apparent right, had been found to prevail.

The known and received usage of a particular trade or profession, and the established course of mercantile or professional dealing, are considered to be tacitly annexed to the terms of Usage of trade.

(a) S. D. 1853, p. 525. (b) S. D. 1855, p. 266; see Wilson's Dictionary, p. 120.
(c) S. D. 1846, p. 245; see Reg. VIII. 1793, s. 56.

every mercantile or professional contract, if there be no words expressly controlling or excluding the ordinary operation of the usage. Thus though a bill of exchange is on the face of it payable on a day certain, yet the three additional days of grace accorded by the known custom of merchants, are annexed to the terms of the written instrument, and make a part of the contract.

Bill of exchange.

Usage may be referred to where the contract is silent, but not in order to vary or contradict its express terms.

Hiring.

Where a workman is hired for a year to work at a particular trade, under a written agreement which says nothing as to any period of absence to be allowed to him, evidence may be given to shew that it is the custom of the particular trade for the workmen employed in it to take certain holidays, and to absent themselves on such occasions from their work, without the permission of their masters.

Implied clauses of contracts.

Clauses usual in the contract must be supplied therein, although they are not expressed, e. g. in a contract for the lease of a house, it is understood, even if it be not expressed, that the tenant shall do such repairs as are usually done by tenants.

One part of agreement interpreted by the other.

All the clauses of agreements are interpreted by each other, so as to give to each the sense derived from the entire document.

Agreement not extended beyond intention of parties.

However general the terms may be in which an agreement is couched, it only comprehends things respecting which it appears that the parties intended to contract. Thus if a legatee compounds with the representatives of the testator for all his rights arising under the will, he will not be excluded from demanding another legacy given by a codicil which does not appear till afterwards.

If A and B, being at variance regarding a certain sale of goods by one to the other, and not knowing of any other matter in which their interests are conflicting, should come to an agreement on the subject, and mutually discharge each other of all demands whatsoever,—and it turns out that before this discharge A had, without his own knowledge, acquired another claim upon B, (as where A's gomashta purchased for him a hoondee accepted by B)—this is no discharge of the claim which the parties did not know of.

Certain language in one part controls uncertain in another part.

If the operative part of a bond be vague and indefinite,—as for instance in the case of a surety bond, if it contain expressions applicable to an unlimited suretyship,—while the recitals limit the engagement to a specific sum, the sense of the recitals ought to prevail.(a)

(a) S. D. 1845, p. 427.

CHAPTER VII.

RIGHTS OF THIRD PARTIES.

Agreements have effect only between the parties.

AGREEMENTS have no effect except between the contracting parties. They do not work injury to a third person, nor can he in general claim any profit from them.

If for instance the land of A has been already mortgaged to B, and A without B's permission contract for the sale of it to C, or grants C a putnee lease of it, or it is ordered to be sold to pay other debts of A, this does not affect B's rights but is a mere nullity as against him.(a) Or if two persons who are jointly indebted to a third, agree between themselves that one of them shall take upon him the payment of that debt, the right of the third party to recover his debt from both, remains unimpaired, unless he assents to the arrangement.

Assignment of debt due from third party.

A in payment of a debt, may assign to his creditor the right to receive a debt due to himself, and such assignment ought to be signified to the person liable to pay; after which it is not lawful for him to pay the money to A, and he is liable (whether he has assented to the transfer or not) to be sued directly by the assignee.(b)

How creditors may enforce the rights of their debtor against third parties.

Creditors may indeed put in force all claims belonging to their debtor, with the exception of those which are exclusively attached to the person, such as actions for assault or defamation. But a creditor cannot take upon himself to exercise this right of

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(a) Con. 856, 24th January 1834, pp. 434, 144; S. D. 1851, p. 557.

(b) S. D. 1853, p. 224.

his own authority. Such claims can only be enforced either under the directions of the Court after the creditor has seized in execution and sold all debts due to his debtor, or by the assignee when the debtor has taken the benefit of the Insolvent Act.(*a*)

Creditors may also, in their own name, impeach acts done by their debtors in fraud of their rights.

Persons between whom there is no privity.

Where there has been no assignment, and no authority is given by the Court, a person though interested in a fund is not at liberty to bring suit directly against those in whose possession it is. In such a case neither party has entered into any contract or dealing in respect of the fund, with the other or with those whom he represents,—there is no privity between them.

A putnee lease carefully reserved a rent certain to the zemindar, and provided that if the rent payable to Government should be enhanced, still the rent payable to him should not be diminished. The rent payable to Government was reduced, but the zemindar was not allowed to gain by this reduction, as he was no party to the transaction.(*b*)

Agreements not to be varied by subsequent occurrences.

People who have once bound themselves by agreement are held to its terms, and are not allowed to recede from it in consequence of what may have taken place subsequently between one of them and a third party. A, a zemindar, granted a lease of chur lands to B at a specified rent, and B paid rent accordingly for some years. Afterwards, during the currency of the lease, the lands were "resumed" by the Government who made a settlement with A, upon an estimate of rent lower than that reserved by the lease. The settlement was not to take effect until a period sub-

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(*a*) Civil Procedure, 3rd Ed. p. 435; Con. 293, para. 3; S. D. 1851, p. 178; Con. 1248; 2 Sev. Rep. 191.

(*b*) S. D. 1857, p. 1946.

sequent to the expiration of the lease.(*a*) B, the tenant on learning these facts, claimed to pay rent upon the lower estimate adopted by the Government, but was decreed to pay according to his lease.

A, a zemindar, let to B on lease at a specified rent, a talook Kistoram, containing a specified quantity of land.(*b*) It was afterwards discovered that the land actually made over was slightly in excess of the computed quantity, and also, that both in respect of such excess, and in respect of one-quarter of the specified quantity, the land was *noabad*, for which A was called upon to pay a fresh assessment to Government.

The Court held that in respect of the one-quarter of the specified quantity A was not entitled to any additional rent from B on account of the fresh assessment, but that the excess above the specified quantity should either be relinquished to A, or charged with rent at the same rate as the rest of the talook.

Where land tenure injured by acts of third party.

Persons may have contracted such a relation with each other, particularly under the various incidents of the tenure of land, that one of them may be injured by a contract between the other and a stranger, and yet the party injured may not be suffered to impeach the transaction in the Courts.

Where an under-tenant, a shikmee talookdar, claimed to reverse a settlement between the Government and the zemindar from whom he held his talook, stating that he was endangered by that settlement: the Court determined that the under-tenant could not be heard, and that if he had suffered he could claim damages only from the party or parties by whom he had been injured.(*c*)

(*a*) S. D. 1853, p. 621. (*b*) S. D. 1853, p. 616. (*c*) S. D. 1852, p. 792.

Besides the cases in which the contract is void as between the parties who have made it, there are many cases in which a third party has been defrauded by the collusion of the two contracting parties, and in which he has a right to rescind the transaction. Where a man may rescind collusive transaction of others.

Menu(*a*) says—when the judge discovers a fraudulent pledge or sale, a fraudulent gift and acceptance, or in whatever case he discovers fraud, let him annul the whole transaction.

No legal observance can give effect to a collusive transfer in which both the seller and the purchaser are in league, to deprive a decree-holder of the means of enforcing his decree against the seller.(*b*) Collusive alienation to defeat judgment.

A father executed a deed of gift to his daughter, of all his property, but it was provided by the deed that he was to hold possession and enjoy the profits of his estate as long as he lived. His daughter did not in fact obtain possession until his death, which happened two years afterwards. A bond creditor of the father having then sued the daughter for payment, it was held(*c*) that the transaction was a fraudulent and nominal transfer, which could not be a bar to the liability of the daughter in possession of her father's estate: and she was made liable, so far as his estate extended, for her father's debts.

It seems to be considered the duty of a man, especially a trader, who cannot meet his engagements, to declare himself insolvent, and to divide his property among his creditors in proportion to the debts owing to them respectively.(*d*) By insolvent to defeat creditors.

(*a*) Menu, Chap. VIII. article 165.

(*b*) Agra, 1852, p. 603; Sel. Rep. v. 7, p. 191, 17th February 1845; S. D. 1853, p. 85; See Construction 588.

(*c*) S. D. 1850, p. 318; see S. D. 1856, p. 458; Con. 1209, Agra, 1851, p. 153.

(*d*) Agra, 1853, p. 353.

Where a man, after his failure, made over to a creditor certain debts due to him, in part satisfaction of a demand of an amount specified,—and it did not appear by the books that so much was actually due to the creditor,—this was held to be a fraud upon the other creditors, and the Court refused to enforce the payment of the debts so assigned.(*a*)

(*a*) Agra, 1853, p. 353; see Reg. II. 1806.

CHAPTER VIII.

CONDITIONS.

An obligation may either be absolute, as where A promises to pay B 100 Rupees; or conditional, that is, dependent upon the happening of some event, or the performance of some prior or precedent act,—absolute upon the completion of such event or act, and null if it does not occur,—as where A promises to pay B 100 Rupees, provided that a certain person returns from Benares, or provided that B delivers a certain horse to A, or marries a certain person. Obligations absolute and conditional.

Obligations are generally absolute when the consideration is made good at the time of the bargain, and qualified or conditional when the party binding himself is not at once enabled to enjoy that, (whatever it may be) which forms his inducement to bind himself.

A condition is sometimes based on that which is called chance, and which is in no respect in the power of either of the contracting parties; as, "if such a ship shall arrive safe." Condition casual.

Sometimes a condition makes the performance of the agreement to depend on an event which it is in the power of one or other of the contracting parties to cause to happen or to prevent from doing so. "I will give you so much if you will cut down a tree on your land which obstructs the view from my windows," is an instance of a condition of this sort. Condition in the power of party.

Some conditions depend at once on the will of one of the contracting parties, and on the will of a third person, as, "if you marry my cousin." Or of a party and others.

Agreement void if condition impossible or immoral.

Every condition which is impossible, or contrary to good morals, or prohibited by the law, is null, and renders the agreement which depends thereon null or voidable: as, where A promises to pay a certain sum to B, on condition that he shall go from India to England in one day, or shall assassinate C, or shall manufacture salt in violation of the laws of this country, or shall aid in defeating the just demand of any man's creditors.(a)

Obligation null if condition in sole power of obligor.

Every obligation is null when it has been contracted under a condition which rests on the arbitrary discretion of him who binds himself; as where a man engages to give me an estate *if he pleases*, this is no obligation, for he is free to give or to withhold, and a man cannot be at the same moment bound and free.

But an obligation may depend upon the pure and single will of a third person; that is, I may contract to give or to do something if a third person consents to it.

Condition to be performed according to intention.

Every condition must be accomplished in the manner in which the parties wished and intended that it should be.

If there is a covenant or condition in a lease, to leave all timber on the land, it is a breach if the tenant cuts down the trees, though he leaves them behind him. And for this reason, that what was in the contemplation of the parties was that the timber was to be left standing.

When a condition is deemed to have failed.

When an obligation is contracted conditionally on an event happening within a fixed time, as, if A contract to pay B so much if a certain ship shall return within the year, such condition is deemed to have failed when the time has expired without the event taking place.

(a) See S. D. 1856, p. 1073.

If there be no time fixed, the condition may at any moment be accomplished; and it is not taken to have failed until it has become certain that the event will not happen. Thus, if the condition be to pay ten rupees "if such a man shall leave a son surviving him," it may be fulfilled at any time until the man dies leaving no son surviving him.

When it is deemed to be accomplished.

When an obligation is contracted under the condition that an event shall not happen within a fixed time, such condition is accomplished when the time has expired without the event having occurred; or when, before the time limited, it becomes certain that the event will not occur. And if there have been no time fixed, the condition is not accomplished until it is certain that the event will not happen. Where the condition is, "provided a certain ship does not return in safety,"—the condition is not fulfilled until it becomes certain (as it may by intelligence of loss) that she cannot return in safety.

The condition is taken to be accomplished, when the person, bound under such condition, has himself prevented the accomplishment thereof.

Effect where person bound, has himself prevented fulfilment of condition.

If A is to pay money to B upon an act being done, and B is ready and offers to do the act, but A hinders him, this is tantamount to performance, and B acquires a complete right to the money. A cannot take advantage of a non-performance which he has himself occasioned.(*a*)

A condition, when it has once been accomplished, has a retrospective effect, and is considered, as to its consequences, to have been accomplished on the day on which the engagement was con-

Retrospective effect of accomplished condition.

(*a*) S. D. 1857, pp. 101, 260; where the act to be done was the payment of money to secure certain advantages, and the man who was to receive the money purposely evaded receiving it.

tracted. If the person in whose favor the contract was, be dead before the accomplishment of the condition, his rights pass to his representatives.

Condition precedent.

An obligation contracted under a condition precedent, or suspensive, is that which depends either on an event future and uncertain, as, if A shall return from Benares, or "if he shall deliver to me a certain horse,"—or on an event which has actually happened, but which is still unknown to the parties, as, "if A is still alive."

In the first case, the obligation is not to be performed until after the event.

In the second case, the obligation takes effect from the day on which it was contracted, when once it is ascertained that A was alive at the time.

If a master binds himself to teach a particular trade to his apprentice, and the latter binds himself to serve the master for a certain term, the continuance and carrying on of the trade by the master, constitute a condition precedent to the liability of the apprentice to serve.

If a workman agrees to manufacture and work up his own materials on the terms that he is to receive a certain remuneration if the work is approved (as where a tailor makes a coat for a customer), the approval of the work constitutes a condition precedent to the workman's right to receive any remuneration.

The consideration may be executory; that is to say, the performance by one party of his part of the contract, may be the consideration for the performance by the other of his part of the contract; in which case the performance by the first constitutes a condition precedent to any right on his part to sue.(a)

(a) S. D. 1857, p. 259.

No person can call upon another to perform his part of a contract until he himself has performed all that he has stipulated to do as the consideration of the other's promise. This rule applies to every case of a sale of property, where one engages to convey on a certain day, and the other to pay at the same time. And it applies whether the one promise be stated in terms as the consideration of the other, or not. In neither case will the Court compel one party to perform his part, until the other has done or offered to do his own. Conditions dependent upon each other.

Whenever the agreement is that one man shall do an act and that the other shall pay for the doing thereof,—as that A shall build a house for B, and that B shall pay him so much for building it,—the doing of the act is a condition precedent to the payment, and the payment depends upon this condition. And he who is to pay, cannot be compelled to part with his money till the condition is complied with.

But if a day be appointed for payment of the money, and the day is to arrive before the thing can be performed,—as where A agrees to sell and B agrees to purchase of A certain land, and B agrees to pay, on or before a fixed day, as the consideration of such sale and purchase, a fixed sum to A,—an action may be brought for the money before the conveyance of the land is executed by A. For in this case it appears that B relied on his rights and remedy under the contract, and intended not to make execution of the conveyance a condition precedent; and so his contract to pay in no degree depends upon the performance by A of his part of the agreement.* Where payment is to be made independently of the delivery of the thing sold.

* Where the sale of a piece of land had been completed by the execution of the deed of sale and the delivery of possession, and the purchaser had without opposition registered himself as owner, it was held that the vendor could

Where the thing is to be delivered independently of payment.

Where, however, a certain day is appointed, and that day is to arrive subsequent to the performance of the thing to be done under the contract,—as if A is to build me a house to be ready for occupation on the 1st of May, and I am to pay him on the 1st of June,—or if he is to deliver to me 20 maunds of hooley powder on the first day of Poos, and I am to pay him a fixed price for them on the first day of the following month,—in such case, performance is a condition precedent, and must be proved in an action for the money, for every man's bargain ought to be performed as he intended it. Where it appears by the agreement itself that he intended to pay the money and trust to his right of suit to compel the other party (if necessary) to perform the contract or make suitable compensation, then it is just to leave him to his rights under the contract. But on the other hand, there is no reason why a man should be forced to trust where he never intended it. And therefore if two men agree, one that the other shall have his horse, the other that he will pay 100 Rupees for it, no action lies for the money until the horse has been delivered.

Contract of sale.

If a man agrees with another for goods at a certain price, he may not carry them away before he has paid for them, for immediate payment is contemplated, unless the contrary be expressly agreed to. And therefore if the vendor says, the price of an article

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recover the unpaid purchase money only by bringing a separate suit for it; S. D. 1857, p. 222.

Where land had been sold and the sale was evidenced by the execution and delivery of the deed of conveyance on the part of the seller, and by the payment of the purchaser of a portion of the price agreed to; the Court held that although the right of property had passed to the purchaser, yet the right of possession, *i. e.* a lien on the land, remained in the vendor until the purchase money should be paid in full,—and declined to order the vendor to give up possession, or to direct that the purchaser's name should be registered as owner; S. D. 1858, p. 601.

is ten Rupees, and the vendee says he will give ten Rupees for it, the bargain is struck, and neither of them is at liberty to be off it, provided immediate possession of the goods be tendered by the one, or the price by the other. If they part, without payment of the money, or delivery of the goods, or tender made, or any further agreement, the contract is rescinded, and the owner may dispose of the goods as he pleases. But if any part of the price however trifling is paid down, or if any portion of the goods is delivered by way of earnest, this is so strong an evidence of contract that the property in the goods is absolutely bound by it, and the purchaser may recover them by action, on tender of the remainder of the price, while the seller being ready to give delivery may recover the price.

The owner of land agreed to sell it for 140 Rupees(a) of which he received 100 Rupees in part, and thereupon executed a document containing a receipt for that sum, to which was added an engagement to execute a bill of sale provided the remaining 40 Rupees were paid within 15 days. The Court, (after a very unnecessary reference as to the effect of such a contract under the Mahomedan law, which they were not bound to follow) ruled that the obligation must be fulfilled, and that the seller was not at liberty to retract if the money was tendered within the time agreed upon.

How dependent and independent contracts are to be distinguished.

The dependence or independence of contracts is to be collected from the evident sense and meaning of the parties: and however transposed they may be, in the government of contracts their precedence must depend upon the order of time in which the intent of the transaction requires their performance.

(a) S. D. 1848, p. 499.

Thus where a tradesman agrees to assign over his stock-in-trade and the good-will of his business, at a fair valuation, and the intended assignee agrees to give security for the payment of the consideration money, the essence of the agreement is, that the former should not trust to the personal security of the latter, but, before he delivers up his stock and business, should take good security for the payment of the money. The giving of such security, therefore, is clearly a condition precedent, and until that is performed he cannot be compelled to fulfil his part of the engagement.

Covenant founded on common liability.

Where a covenant is founded on a common liability, to be created by a deed between the parties, as where the submission of A and B to arbitration is the consideration which induces C to submit to it, and the submission of A and C is the consideration with B, and the submission of B and C is A's consideration, if the deed of submission does not bind all the parties thereto, it does not bind any, as the mutuality of engagement is the essence of the contract.

Where time is of the essence of the contract.

If the contract is entire and indivisible for the performance of a particular thing by a day named, the time appointed for the doing of the act is of the essence of the contract, and if the thing is not done by the day fixed, the other contracting party may release himself from the contract, and may sue for damages.(a)

Even where time was originally of the essence of the contract, it ceases to be so if the party waives objections on that score, and avails himself of the contract and accepts performance at a later day.(b)

Where engagement is to perform several acts.

But if the contract is for the performance of several acts and duties at different periods of time, the non-performance of any act

(a) 6 Sel. Rep. p. 247; S. D. 1855, pp. 13, 40. (b) See S. D. 1857, pp. 101, 257.

at the exact period specified will not be a condition precedent to the right of action upon the contract, unless the neglect has had the effect of precluding the defendant from deriving any benefit or advantage from the contract.

Where a grant is made subject to a condition that the grantor may resume the thing granted on the other party's failing to pay rent for three kists or instalments,—the grantor is absolutely entitled to take possession immediately upon the occurrence of the event, and possession ought to be given up to him at once, as no subsequent tender of the money in arrear and no intervention of judicial authority, can revive the grant which has become absolutely null.(a) How a forfeiture of tenure may be enforced.

A term, or a space of time may be granted to a contractor for discharging his obligations. There are express terms, resulting from the positive stipulations of the agreement, as where I undertake to pay a certain sum on a certain day. And there are also implied terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder agrees to construct a house for me, I must allow a reasonable time for his fulfilling his engagement. So, if a person in Calcutta undertakes to deliver a parcel at Benares, the engagement tacitly includes the time necessary for taking it to Benares. Terms in contracts.

A term differs from a condition, inasmuch as it does not suspend the engagement, but only retards the execution of it, as, where an arrangement is made for payment of a debt by instalments.

That which is not due until after a term, cannot be demanded until the expiration of the term. But that which has been Payments in advance cannot be recovered.

(a) S. D. 1853, p. 678.

paid in advance, cannot be recovered: because the debtor has only paid that which was in fact due from him, though he could not have been compelled to pay it at the time, and he cannot derive any collateral advantage from an anticipated payment. Thus, if he is bound to pay money on the 1st of June with interest up to that date, he cannot discharge himself of intermediate interest by giving the principal on the 1st of May against the will of the creditor, who by express stipulation was to have interest up to a subsequent period.

No payment in advance against interest of party receiving.

How a term given for payment may be lost.

A debtor can no longer claim the benefit of the term when he has become bankrupt, or when by his own act he has diminished the security which he had given by the contract to his creditor. For the term granted by the creditor to his debtor is supposed to be founded on a confidence in his solvency, or in the security, whatever it was; and when that confidence is gone the reason for granting the term is gone.(a)

Where no time fixed for performance.

If no time has been fixed within which a contract is to be performed, either party may give the other reasonable notice to perform it, and on his failure may rescind the contract. The circumstances of each case must determine what is reasonable notice.

Alternative obligations.

An alternative obligation is contracted where a person engages to do or to give several things in such a manner that the doing or giving of one will acquit him from all,—as if he engages to pay on a certain future day, either twenty maunds of the finest rice, or the market price, on that day, of twenty maunds of the finest rice.(b)

A debtor in respect of an alternative obligation, is discharged by the delivery of one of the two things which were comprehended in the obligation.

(a) S. D. 1855, p. 353. (b) S. D. 1857, p. 118.

The election belongs to the debtor, if it has not been expressly accorded to the creditor.

A person thus bound may discharge himself by delivering one of the things promised; but he cannot compel the creditor to receive one part of one, and one part of the other: he must not tender to him ten maunds of rice, and the price of ten maunds more.

An obligation is pure and simple, although contracted in an alternative manner, if the one of two things promised could not be the subject of obligation; as if instead of rice, he had contracted to deliver opium to be obtained contrary to law.

CHAPTER IX.

OF CONTRACTS BETWEEN ONE PERSON AND SEVERAL PERSONS.

Contract with two jointly, to be performed to both jointly.

If A make a contract with two jointly, it is with those two jointly that he is to perform it.

If two jointly lend him money, he must pay it to both jointly. If two jointly deposit goods with him to keep or hire, he must deliver the goods back to the two, and it is not lawful for him to give them up on the demand of one party without the concurrence of the other.

Bond to one partner.

Where a bond has been granted to a partner in a banking house, it is usual after his death, for his surviving partners to sue upon it, where it is known to have been intended as a bond for partnership purposes.(*a*)

Where several joint owners allow one to possess.

But if several joint owners of a sum of money allow one of them to deal with it and to place it in the hands of a banker to his separate account, the banker must treat that as a contract with the one individual who deals with him, and must account to him alone for the money. It is not right to look beyond the terms of the agreement to see how the parties are interested as among themselves. The agreement contains all that they have chosen to make known to the person with whom they contracted, and he ought not to be compelled to take part in their private arrangements.

(*a*) S. D. 1846, p. 160.

If it appears by the terms of a contract that the consideration moves from several of the contracting parties, or that they have a joint interest in the performance of the contract, and sustain joint damage by reason of non-fulfilment, they ought to bring a joint action.

Where consideration or interest joint, the action is also joint.

If on the other hand, it appears from the terms of the contract that they take several interests, and that separate duties and engagements arise in favour of each, and that the damages consequently are several, and can be apportioned,—separate actions must be brought.

Vice versâ when separate.

If a man contracts with several persons to keep an embankment in repair, and it appear on the face of the contract that they are separate landowners, possessed of separate estates, then if the embankment is not kept in repair, each may sue separately in respect of the damage sustained by his own estate.

Contract with several, when divisible.

If in consideration of services to be rendered, a promise is made to several persons to pay them a sum of money, this is a joint promise in favor of all, on which a joint action must be brought, whatever may be the share which each is to receive after the stipulated sum shall have been paid. But if by one contract it is stipulated that separate sums are to be paid to each, each may sue separately for his money.

Promise to pay to A and B jointly.

Where the affairs of a banking firm were wound up by arbitrators duly appointed, who settled and defined the respective shares of the partners, according to which they were to receive the outstandings when recovered, which were to be made good to them by the gomashta of the late firm,—one sharer was allowed to sue the gomashta separately for his portion of an outstanding which the latter had received and had not brought to credit in account.(a)

After severance the parties may sue separately.

(a) S. D. 1852, p. 829.

Right to enforce joint contract devolves upon survivor.

Where a contract has been made with two persons jointly and one of them dies, the survivor is by the English law entitled as between himself and the contractor, to enforce the covenant although he may be accountable in respect of it to those upon whom the beneficial interest of the deceased has devolved. The survivor may therefore sue upon the contract.

The Courts would of course follow the English law in an English case, but not in the case of Hindus and Mahomedans, among whom this doctrine of survivorship does not exist.

Ruling as to right of heirs to sue separately for debts due to deceased.

Thus it has been ruled,—between Hindus,—that if the right to receive a debt secured by bond, devolve by inheritance, upon more than one person, the heirs may bring separate actions to recover the proportion that each is entitled to.(*a*) But this division of interests upon death often subjects the debtor to some inconvenience and even risk, because it obliges him to acquaint himself with the state of the family of the deceased creditor. The safe course for such debtors is to require a certificate to be taken out under Act XX. of 1841 before they make any payments.(*b*)

Inconvenience of this.

If two men have dealings together and one dies, the survivor can enforce his claim (if any) against the estate of the deceased, only by suing his legal representatives, and he ought to take care to ascertain precisely in whom the legal representation is vested, according to the system of law which may happen to be applicable.(*c*)

In suits for rent the zemindar is not compelled to look beyond his *cubooleeut*, or his registry, to ascertain who the parties res-

(*a*) Sel. Rep. v. 7, p. 392.

(*b*) See also Act X. 1851, Act VIII. 1854, Esoda Bye v. E. I. Co. 1 Taylor and Bell's Rep. p. 290; Ram Doss v. Goorpochurn Sein, Morton's Rep. by Montriou, p. 270; S. D. 1851, p. 483; S. D. 1852, pp. 217, 408; S. D. 1853, p. 898.

(*c*) Agra, 1856, p. 218.

ponsible to him are. If the joint sharers of an under-tenure choose to take a lease from a zemindar, and to record that lease in the name of one of the sharers, they themselves remaining in the back ground, they must take the consequences. They have no contract with the zemindar and no claim upon him. Their contract is with their co-sharer alone, and if he has covenanted to pay the whole rent, and makes default, they have no defence against the zemindar.(*a*)

Indeed no one can sue another *merely* because that other has derived some benefit from his property.

Where A lets out his boat on hire to B, who lets it to C, who lets it to D, A cannot sue D for the hire of the boat—because there is no privity of contract between them. He must sue B, with whom he did contract.(*b*)

Though a plaintiff is not obliged to take notice of secret understandings and trusts, yet he may do so where they are employed to cause him injury. A and B, as purchasers of a putnee talook, distrained the property of the tenant, and an application which the latter made to the Collector to be allowed to give security to contest the distraint, was rejected. He was however allowed to sue A and B, along with the former proprietors, for damages, on the ground that he had already paid his rent to the former proprietors, and that these latter had purchased the talook *benamee* in the name of the ostensible purchasers, and that the illegal distraint was the act of all.(*c*)

(*a*) S. D. 1857, pp. 492, 808. (*b*) S. D. 1857, pp. 1028, 1013.
(*c*) S. D. 1857, p. 740.

CHAPTER X.

PAYMENTS, AND THEIR APPLICATION.

To whom payment must be made.

PAYMENT of a debt arising out of contract, must be made to the creditor or to some one having authority from him, or who shall be authorized by the Court, or by the law, to receive it for him.

Authority to receive.

The possession of a general mookhtarnamah does not entitle the mookhtar to receive money. His authority to do so must be express.(a)

A tenant is not safe on paying rent to a gomashtah who cannot produce an express authority to receive rent.(b)

Ratification.

But although the agent may not have possessed this authority, yet if the creditor subsequently recognize or sanction his receipt of the money the debtor is discharged.(c)

If A holds money of B's with instructions to pay it to C for a particular purpose, and A pays it to C accordingly, A is not responsible although the money is afterwards misappropriated by C, unless he has colluded with C.(d)

If a creditor desires his debtor to pay the amount of the debt to his account at a particular banker's, or to remit the amount by post, the debt is discharged as soon as the payment has been made into the bank, or upon the actual delivery at the Post Office of a letter containing the money, addressed to the creditor at his usual place of residence.

(a) S. D. 1852, p. 472. (b) S. D. 1855, p. 351. (c) S. D. 1849, p. 474.
(d) S. D. 1846, p. 50; see S. D. 1850, p. 165.

Payment to one of several partners in trade is equivalent to payment to the firm, because each partner is according to mercantile custom authorised by the others to receive payment of debts.

Payment of partnership debt to one of partners.

Payment to one of several executors of a debt due to their testator, is a good payment as against the others, for each executor has authority under the will to collect and receive debts due to the estate.

Payment to one of several executors.

If both parties meet together and state an account, and various pecuniary claims are made and allowed on both sides, and a balance is struck and paid over, and the account settled, the allowances in account are, in effect, payments.

Payment by set off in account.

Payment made bonâ fide to him who is in actual possession of the legal right to receive, is valid, although he be so by eviction of the person previously entitled, and although such eviction may eventually be pronounced illegal.

Payment to the owner de facto.

Where in a proceeding held under Act XIX. of 1841, to which A and B were parties, the Judge has determined summarily the right of possession of certain lakhiraj land in favor of A as landlord or superior, and its immediate occupancy by B as holding upon a putnee lease, A is entitled to receive from B the arrears of rent due upon the putnee, even though B may have paid them to a third party claiming to be owner.(a)

Payment of rent to party in possession.

If a man sells to another a zemindary, to which a putnee tenure belongs, the putneedar on production of the *kabala* or deed of sale, the *aumulnamah* or warrant to pay rent, and his own *cubooleeut* or counterpart agreement for the putnee tenure, ought to pay his rent to the purchaser, and if he does not he will have to pay the costs of a suit, brought by the purchaser for rent. If he

(a) S. D. 1856, p. 255; see however S. D. 1856, p. 1062.

be sued for rent both by the zemindar and by the purchaser, he ought to offer to deposit in Court the rent due from him.(a)

Payment is valid when made to a person who holds probate of a supposed will, although the will may afterwards be pronounced a forgery and the probate be cancelled, or to an administrator, though the letters of administration are afterwards revoked, or to a person holding a certificate under Act XX. of 1841, though it be afterwards set aside—and this, even although at the time of payment it was known that the matter was in contest.

Payment to creditor under disability.

Payment made to the creditor is not valid if he were incapable of receiving it, unless the debtor can prove that the thing paid has turned to the benefit of the creditor.

Payment by instalments not compulsory.

The debtor cannot oblige the creditor to receive partial payment of a debt, but the Courts sometimes(b) allow payment to be made by instalments.

Of article not determinate except in species.

If the debt consists of a thing which cannot be determined except by its species, *i. e.* so many oxen, the debtor is not bound to give it of the best kind; but he must not offer the worst.(c)

Place of payment.

The payment or delivery ought to be made at the place appointed by the agreement. If the place be not designated therein, when a specific article is in question, it should be made at the place where such article was at the date of the contract.

When the creditor is not resident at the place where the payment ought to be made, he ought to appoint a domicile there for the purpose, otherwise he cannot say that the debtor has failed to pay him at the proper time, and so entitle himself to damages for breach of contract. This domicile may be notified to the debtor either by the agreement itself or by a subsequent an-

(a) S. D. 1845, p. 194. (b) C. Procedure, Ed. 3, p. 427. (c) S. D. 1858, p.

nouncement. In default of the creditor having such a domicile the debtor may require him to appoint one, and if he does not the debtor may appoint one himself.

If the agreement contains two different places for payment, which are named in the alternative, the whole payment ought to be made in one of the places at the option of the debtor.

In a recent case,(a) A holding certain decrees against B, on account of arrears of rent in respect of his lands in Jessore, attached the factories of B in Jessore. C having purchased the factories, it was agreed between A and C that A should give up a part of his claims under the decrees, and that C should satisfy the remainder by instalments to be paid at the times specified in the deed of agreement, and failing payment, on production of the deed the full debt was to be exigible.

The compromise was effected in Calcutta, and the deed was executed there. The creditor resided in Nuddea, occasionally in one part of that district and occasionally in another, and the debtor resided in Jessore. The debtor held himself ready to pay the instalment money in Jessore, but the creditor's agent there refused to receive the money, and had not the deed in readiness according to the agreement.

In the Sudder Court, two Judges out of three considered that the creditor ought to have had a properly empowered agent at Jessore, ready to produce the deed and to receive the money.

Debtor must find out his creditor.

The rule of the English law is, that where no place is expressly or by implication appointed in which payment ought to be made, it is the duty of the debtor to find out his creditor and pay him, and this is perhaps the most convenient rule. But if the

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(a) S. D. 1857, p. 101.

creditor thinks fit to receive payment in a place in which he was not obliged to receive it, the payment is valid.

Premature payment.

Payment before the day appointed is equivalent to payment on that day, except where it is disadvantageous to the creditor to receive premature payment.(a) Even in that case the payment is valid if the creditor chooses to waive his objections and to receive the money.

Ineffectual payment is no discharge.

If a man pays his own debt with the money of other persons, or even with his own money, under such circumstances that the creditor is not legally entitled to retain it, but is compelled to yield it up, the payment does not discharge the debtor.

The performance of a contract cannot be compelled after the lapse of a certain time from the day when the cause of action upon the contract arose. On this subject the law of limitation generally, must be studied.

Legal presumptions as to payment.

Independently of positive enactment which takes away the remedy of the person interested, there are certain reasonable presumptions which the law will adopt until the contrary be proved.

Thus where servants or workmen are in the habit of being paid weekly or monthly, and of supporting themselves by their week's or month's wages, the presumption is in favor of a regular payment having been made, according to the ordinary course of the business or employment, in the absence of any demand for payment on the part of the workman, or any admission by the employer that arrears are due.

When a bill proved to have been once in circulation after having been accepted, gets back again into the hands of the acceptor,

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(a) Supra, p. 86.

and is produced by him, the presumption is, that he has got it back by having paid it.

Application of payments.

The payments hitherto spoken of are in cases where there is but a single obligation to be discharged. Where however a man owes several debts to one person, he has a right to declare, when he makes a payment to the creditor, which debt it is his purpose to discharge: and his creditor, if he accepts the payment at all, must accept it upon the condition attached to it. The purpose of the debtor may be presumed from his acts, even if not expressed in words. For instance, where a bill or note falls due, and he on that very day pays a sum equal to the amount of the bill or note; or where the creditor has just demanded payment of a particular debt, and the debtor pays him exactly the amount of the debt so demanded.

The payer may appropriate.

Applicable by law.

If one who owes both principal and interest makes payments to his creditor,—in the absence of any express agreement, such payments are to be applied first in discharge of the arrears of interest, and next (if any thing remains) in reduction of the principal.(a)

Appropriation by creditor.

If the debtor does not make expressly or by implication, any specific appropriation of his payment, as in discharge of a particular debt, the creditor is at liberty, generally speaking, to apply it in discharge of whichever debt he pleases; and he may do this at any time he chooses, up to the hearing of a suit against him by the debtor regarding these very payments.

When it may be made.

If the appropriation is made in the books of the creditor, but not communicated to the debtor, the creditor is not bound by it,

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(a) S. D. 1850, p. 504; S. D. 1853, pp. 641, 681; S. D. 1847, p. 33; see S. D. 1856, p. 1024.

and may afterwards make a different application of the money, but after it has been communicated to the debtor, the appropriation is irrevocable.

Appropriation must be for lawful debts.

The appropriation must be made however in discharge of a lawful debt or demand, and not of one arising upon an illegal consideration.

If one of the debts is still liable to be sued for, but the remedy (though not the right) of the creditor in respect of the other debt is barred by lapse of the ordinary period of limitation, the creditor may apply the payment in discharge of the debt so barred; but he must of course be prepared to prove that such debt really existed.(a)

If there be an admitted debt, and a disputed or unascertained debt, the payment must not be appropriated to the disputed or unascertained debt.

If there be a debt due from the payer individually, and one due from him as one of a partnership, if the money is money of the partnership, the creditor must not appropriate it to payment of the private debt.

If one debt be due from him individually and another be due from him in a representative character, as that of executor, a general payment on account is deemed a payment from the debtor individually.

In the case of a banking account, where all the sums paid in form one blended fund, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. The presumption is that the first sum paid in, is the first drawn

(a) See S. D. 1856, p. 192.

out. The first item on the debit side of the account is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other.

Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, the payments made from time to time by the surviving partners must be applied to the old debt. In this case it is to be presumed that all the parties have agreed that it shall be considered as one entire account.

Where there are distinct accounts.

But if the account is not treated as one entire running account, but is divided into separate and distinct accounts, the payments are not necessarily appropriated to the earlier items. Every thing depends upon the mode in which the accounts have been kept, and the communications which have passed between the parties, as shewing upon what footing the one has paid and the other has received.

Appropriation by law.

When no appropriation is made by the debtor or by the creditor, the payment must be deducted from the debt which, among those equally due and payable, the debtor had at the time the most interest in paying:—or if only one debt is actually due, from that one, though less burdensome than others which are about to become so.

If the debts are of the same nature, the deduction is made from that of longest standing. If they are of the same nature and also of equal standing, it is made proportionately from each.

CHAPTER XI.

TENDER.

Principle of tender.

It is not just that a man who is ready and willing to perform his part of a contract should be visited with any of the penalties of non-performance,—such as the costs of an action by the other party for damages,—or that he should be deprived of the benefits which he has stipulated for upon performance.

But many things which have been agreed to be done, cannot be done without the concurrence of both parties; and therefore the contractor who has done as much as it was possible for him to do without the concurrence of the other party, is entitled by law to the same benefits as if he had in fact discharged his obligation.

Where the thing has not actually been done, it is sometimes difficult to prove, after the time has gone by, that the party was ready and willing and offered to do it.

Care should therefore always be taken, to make a distinct tender, or offer of performance, and to preserve evidence of its having been made.

If a man has agreed to deliver goods or to pay money, he is considered to have virtually discharged his obligation if he has tendered the goods or the money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances, that the party to whom

it was made, has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purported to be.

Tender of work and labour.

If the contract be for the performance of work and labour, and the person who has agreed to do the work tenders performance, and the other refuses to permit him to do the work, the former is discharged as completely as if the work had been actually done.

Tender of goods.

If a contract be for the delivery of goods by a fixed day, a declaration by the party to whom they are to be delivered that he will not receive the goods if they are tendered, will, if he persists in it down to the period appointed for delivery, dispense with the necessity of an actual tender.(a)

Must be before action.

A tender has no effect if it be made after the other party has brought his action.

In order that a tender should be valid, it is necessary—

Requisites of tender. Person to whom and by whom.

That it should be made to a creditor capable of receiving, or to a person who has authority to receive for him; and that it should be made by the person who is bound to perform the contract, or if the thing is capable of being done equally well through an agent (as in the case of payment of money) then by an agent ready and able to perform it;

Thing tendered.

That it should consist of the entire thing demandable;

Time.

That the term of credit should have expired;(b)

That the condition under which the obligation exists, should have occurred;

Place.

That the offer should be made at the place agreed on for the payment or performance: and that, if there be no special agree-

(a) See supra, p. 79. (b) Supra, pp. 86, 96.

ment as to the place of payment or performance, it should be made personally to the creditor, or at his domicile.(*a*)

Time and place.

If the thing is to be done at a particular place, and the person in whose favor it is to be done is bound to attend to receive performance, he is not bound to attend after the usual hours of business, unless it is specially agreed that he shall do so. But if he does wait and the tender is made in time to complete performance before midnight, the tender is good.

Application by letter.

If the party who wishes to tender performance, does not know where to meet with his creditor personally, he ought to apply to him, and fix a time and place for the performance of the contract, and to attend at such time and place ready to perform it.

Payment by one for another.

Where a putnee talook has been advertised for sale for arrears of rent, under Regulation VIII. of 1819, if a *dur putneedar*, or any other person entitled to save it, wishes to prevent the sale of the putnee talook, he must actually produce and (if permitted) lodge in the Collector's hands the amount due. But the sale will not be set aside merely because on the day of sale the mookhtear of the *dur putneedar* orally addressed the Collector, intimating his wish to pay the balance, which intimation the Collector refused to attend to.(*b*)

The money must be produced.

A mere offer to pay a debt is not a legal tender, unless the debtor produces the money, or the other party himself dispenses with the production.

A tender to one of several joint creditors is a tender to all.

(*a*) See supra, p. 94.

(*b*) S. D. 1856, p. 330.

CHAPTER XII.

NOVATION, OR THE SUBSTITUTION OF A NEW DEBT FOR AN OLD.

A NEW debt is sometimes substituted for an old one. As when accounts are mutually adjusted between parties and a balance struck, and signed in the books of the parties,—or when a debt previously unsecured is secured by giving a bill, or note, or hat chitta, or bond, or mortgage, either to the original creditor or to some one to whom he has assigned his claim.

The consequence of this proceeding is, that unless there be an express stipulation to the contrary, the old debt is wholly superseded. And the time and place of contracting the new debt, which is substituted for the old, are alone to be regarded, where time and place have to be considered in determining whether the law of limitation applies, or whether the cause of action arose in one district or another.(a)

There is indeed in existence an old construction(b) of the Sudder Court—to the effect that where money was borrowed in a foreign territory, and a bond was executed within the British territories to secure the money—the debt, and not the bond, was the cause of action, and that the suit was therefore not cognizable by the Civil Court, the defendants being then resident in a foreign country. But this construction, which is after all merely a decision given without hearing the arguments of the parties on either side,

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(a) S. D. 1846, p. 82; S. D. 1850, p. 400; S. D. 1852, p. 31; S. D. 1853, p. 141.
(b) Con. 351, 24th January 1823.

is contrary to the later cases which rule that taking security for an old debt gives a new cause of action.

Novation. Where old accounts are adjusted and a new security, as a bond, taken for the balance which has been found due from one party to the other, the new security is looked upon as a new obligation incurred by the debtor, and the Courts will give effect to it. They will consider the execution and giving of the new security as primâ facie proof of the consideration, viz. the adjustment, and will not inquire into it except under special circumstances.(*a*)

If it be agreed between A, a creditor, B his debtor, and C a third party, that A shall thenceforth accept C as his debtor in lieu of B,—the old debt of B to A is wholly extinguished, and at the same moment a new debt from C to A is contracted. But the transaction requires the consent of all three: of B, who procures another debtor in his stead; of C, who enters into an obligation in place of B: and of A who in consequence of the obligation contracted by the party substituted, discharges his original debtor.

A mere order by a debtor B upon a person who owes him money, to pay that money to his (B's,) creditor, does not of itself discharge B, nor make his debtor become the debtor of the person designated in the order. The assent of the latter is necessary.(*b*)

If a farmer at the request of his landlord agrees to pay his rent to the landlord's creditor, it is scarcely necessary to say that he does not thereby become liable for the landlord's debt.(*c*)

(*a*) S. D. 1845, p. 32; S. D. 1850, p. 400; but see S. D. 1849, p. 297; and case referred to, S. D. 1853, pp. 141, 656; Agra, 1850, p. 216; supra, p. 29.

(*b*) S. D. 1853, p. 224.

(*c*) S. D. 1856, p. 351.

CHAPTER XIII.

SET OFF.

When two persons find themselves in each other's debt, it is not necessary that each should actually pay the whole sum due. The one debt extinguishes the other, if they be equal in amount, or if unequal, the smaller debt extinguishes so much of the larger debt as is equal to itself, and the balance only remains payable. When set off takes place.

Thus if A owes B 500 Rupees upon a loan, and B owes A 500 Rupees for the rent of land, which has become due since the loan, the one debt entirely extinguishes the other. But if the loan was only 400 Rupees, B will have to pay A the difference, or 100 Rupees. This balancing of one debt against another is called set off.

If A borrow money of B, and grant him a lease of land at an annual rent, which rent B does not pay but retains to himself in discharge of his debt, and B is ousted by a stranger,—B cannot recover his advance without bringing into account the rent so retained.(*a*) What may be set off.

If during the continuance of a lease the landlord carries off the crop, this is a valid ground of set off against a claim by him for rent from the lessee.(*b*)

(*a*) S. D. 1846, p. 152.

(*b*) S. D. 1850, p. 104.

How it is effected.

Set off is effected absolutely by force of law only, even without the knowledge of the debtors; the two debts are at once extinguished, either wholly, or in proportion to their amount, whenever they exist at the same time.

Only between debts equally demandable.

There is a set off only where two debts are equally liquidated and presently demandable: for as set off is in fact a reciprocal payment by each of the parties, the debtor whose credit is not yet expired, not being liable as yet to pay the debt, is not bound to allow it as a set off against his own demand.

Not where debt unascertained.

A debt, the existence and amount of which have not been established, or are not capable of being easily proved in reply to the plaintiff's demand, cannot be insisted on as a set off. If for instance the defendant has a claim against the plaintiff for damages on account of breach of contract (not being liquidated damages ascertained by the contract itself) this claim cannot form matter of set off.

Nor for deposit.

There can be no set off where the demand is for the restitution of a specific thing of which the proprietor has been unjustly deprived, or for restitution of a deposit.

Not property not liable to execution.

And it would seem that set off ought not to be held applicable to the demand of any kind of property which is not by law seizable in execution of a decree.

A debt barred by the rules of limitation cannot be made the subject of set off.

Price of goods sold but not delivered.

The price of goods sold but not delivered may be set off as a debt, though the vendor has his lien upon them for the price.

Separate debt not set off against joint claim.

Where there are several joint plaintiffs suing for the recovery of a joint debt, (as where the members of a firm in partnership sue for a debt due to the firm) the defendant cannot set off against the joint debt a separate debt due to him by one of the plaintiffs individually.

A surety who is sued upon his engagement, may insist upon a debt due by the creditor to the principal debtor being set off against the creditor's claim upon himself.

Surety may insist on set off of debt due to principal.

But the principal debtor cannot plead by way of set off, a debt which the creditor owes to the surety.

A debtor who has assented unconditionally to the assignment which a creditor has made of his rights to a third person, cannot set off against the assignee a claim, which he might previously have set off against the assignor.(a)

With respect to an assignment which has not been assented to by the debtor, but which has been notified to him, it only prevents the set off of debts contracted after such notification; for it is evident that a man cannot assign a debt due, or to be due, to himself, except subject to the liability to set off under which he himself may be at the time of the assignment.

Where one man granted a farming lease to another and afterwards gave part of the estate in putnee, assigning to the putneedar a certain sum out of the rent payable by the farmer, to which transaction the farmer did not assent,—it was held that the latter, in paying his rent, was entitled to a set off to the extent of his own proved claim against the zemindar.(b)

When the two debts are not payable in the same place, if set off be pleaded, the cost of remitting either sum to the place where it ought to be paid must be deducted from the amount of that sum. For instance, if A owes B 500 Rupees payable at Benares, and B sues A for it at Benares, A cannot plead by way of set off that B owes him 500 Rupees payable at Lahore, if such is not the actual value of that debt at Benares at the time.

Where debts not payable in same place.

(a) Supra. p. 104. (b) S. D. 1852, p. 918.

The cost of remitting the money from Lahore to Benares, that is to say, the rate of exchange between the two places, must be taken into account.

Several debts due from same person.

Where there are several debts the aggregate amount of the whole may be set off.(*a*)

Set off not to prejudice third party.

Set off does not take place to the prejudice of rights acquired by a third person. Thus, if A is a debtor of B, and the debt due from him to B has been legally attached by a creditor of of B's; though A afterwards acquires a claim upon B which he is entitled to set off against his debt to B, yet he cannot set it off as against the attaching creditor.

Debts must be due in the same right.

In applying the doctrine of set off, it must be remembered that the debts which are thus weighed against each other in the balance, must be due in the same right. A debt due from the plaintiff individually to the defendant, cannot be set off against a claim which the plaintiff makes as an executor or guardian. If for instance A borrows money of B and grants his bond for the amount, and B dies leaving C his executor, and C has dealings with A who is a tradesman,—the money due from C to A upon such dealings cannot be set off against that which is due from A to C as executor of B.(*b*) For the creditors, or the heirs of B, might thus be defrauded.

In the like manner, the debt against which the right of set off is claimed must be due to the very person, individually, who relies on the set off. A man who owes a debt is not excused from paying it, for instance, merely because as executor or guardian of some one

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(*a*) Supra, p. 97.

(*b*) But see, S. D. 1847, p. 120. The facts are not stated with sufficient precision to shew positively whether that decision was right or not.

else, he is entitled to exact from his creditor the payment of another debt.

But as a general rule, where there are mutual payments, and nothing to shew that they were made upon different accounts, they may be set against each other.(a)

Where set off waived.

He who has paid a debt which was of right extinguished by set off, cannot, by pursuing the demand, which he might have set off against such debt, avail himself, to the prejudice of third persons, of any securities which were attached thereto,—unless he had a sufficient excuse for not being aware of the set off which he was entitled to make.

(a) S. D. 1852, p. 540.

CHAPTER XIV.

IMPLIED CONTRACTS.

CONTRACTS or agreements may, as we have already seen,(a) be either express or implied. Express contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox or ten loads of timber, or to pay a stated price for certain goods. Implied contracts are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform. Thus if I employ a person to do any business for me, or perform any work, the law implies that I undertake or contract to pay him as much as his labour deserves. So if I take up wares from a tradesman without any agreement as to the price, the law concludes that I contract to pay their real value. Or if I undertake to be the surgeon or the vakeel of a man, the law implies an undertaking to employ reasonable skill and diligence in his affairs. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, viz. that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal.

If one man occupies without any agreement, the house or land of another, he is bound to pay him rent according to the value of his occupation of the premises.(b) If there be no fixed rent, the landlord ought to proceed to secure the proper rent under Regulation V. of 1812.

(a) See supra, p. 70.

(b) S. D. 1845, p. 247.

But an agreement that the occupant shall not be charged with rent, may be express, or may be implied(*a*) from the conduct of the parties. As where A being in the service of B occupied a house of B's for nearly twelve years, without any rent being demanded.

When a person voluntarily manages the affairs of others, whether the proprietor is or is not aware of such management, such manager subjects himself to all the obligations which would result from an express commission given to him by the proprietor.

If one of two sharers in a farming lease takes upon himself to be manager and collector of the profits, the law implies, without any writing, a contract on his part to pay to his co-sharer that portion of the profits which belongs to the latter.(*b*)

He who adopts and takes advantage of the management of his affairs by another, must fulfil the engagements (that is to say, engagements within the proper limits of a manager's authority) which that other has contracted in his name, and must indemnify him against all personal engagements made by him, and reimburse him in all the expences which he has been put to for any necessary or useful purpose.

Where land, which formed part of the joint estate of a Hindu family, was subject to a *ticca* mortgage, and some of the joint tenants gave the ticcadar their bond for the amount, and so recovered from him, for themselves and their co-tenants, possession of the land,—it was held that the co-tenants were liable upon the bond, having thus received consideration for it, and practically adopted the transaction.

But if the estate were not worth the money advanced, and the co-tenants had declined to take possession, they might have been excused.(*c*)

(*a*) S. D. 1853, p. 699. (*b*) S. D. 1856, p. 659. (*c*) S. D. 1855, p. 264.

Where an under-tenant lodges money in the Collector's office to save his zemindar's estate from sale, the law implies a contract by the zemindar to reimburse him. The under-tenant does not however acquire thereby a lien on the estate. He is a mere personal creditor of the zemindar, and if he obtains a decree for the amount advanced by him, it has only the incidents of an ordinary judgment.(a)

A *dur putneedar* possesses, under Regulation VIII. of 1819, s. 13, the right of paying into Court the balance of rent due to the zemindar for a putnee tenure, and thereby acquiring a lien on the tenure. If the *dur putneedar* makes a mortgage of his *dur putnee* tenure, retaining possession of it himself, the mortgagee does not, according to the Sudder Court of Calcutta,(b) acquire the same right which belongs to the mortgagor; if he pays the rent into Court to save the putnee from sale, he acquires no lien upon it, and cannot sue the putneedar for the amount he paid, as there is no privity between them. But he can sue his own mortgagor in possession, the *dur putneedar*, who is to a certain extent a trustee for him and responsible for the preservation of the mortgaged property, for in consequence of the peculiar connexion between them, the law would have implied a request to pay on the part of the *dur putneedar*.

The latter doctrine is quite accurately applied, but the former part of the decision, the exclusion of the mortgagee from the rights of his mortgagor, which are necessary to preserve the estate, is based on a very narrow construction of the Regulation of 1819.

Implied contracts: guarantee. If one man has actually guaranteed to another the price of goods sold to a third party, and if in performance of that guar-

(a) S. D. 1856, p. 867. (b) S. D. 1857, p. 1195.

antee he has paid the whole or part of the price to the seller, he who has so paid has an action against the defaulting purchaser for the amount, according to his implied request under the guarantee.(a)

But if a man who has not given a guarantee takes upon him to pay money which a purchaser has left unpaid, such payment is merely officious and no request can be implied.

He who receives, whether by mistake or knowingly, that which is not due to him, is bound to restore it to the party from whom he has unduly received it.

Money which has been extorted under colour of legal authority may be recovered, on the ground that it has been obtained without consideration, and that the recipient has impliedly contracted to repay it, as his moral duty requires.(b)

Where a ryot does not pay his rents to a person legally put into possession, he is liable to very stringent and summary proceedings.

A purchased,(c) invalidly as it proved, the proprietory righ n land which he held in farm. While in legal possession unde iis purchase, he collected the rents from the ryots,—they payin iim "under the pressure of that moral and legal force, which th le facto proprietor always has it in his power, under the revenu aws, to employ against his ryots." The purchase was annulle ınd the former proprietor was restored to possession, and mad he ryots pay their rents over again to him. It is almost un iecessary to add that they were held entitled to recover fror A the rents they had paid him.

(a) S. D. 1858, p. 1223. (b) S. D. 1856, p. 530. (c) S. D. 1856, p. 1062.

If a mookurureedar(*a*) is subjected to an exaction of rent in excess of that which is incident to his tenure, he is entitled to recover the excess from the person who exacted it, and no weight is attached to the circumstance that the person last named was a lessee of the zemindar (a mutwullee) and collected the rents according to a rent-roll furnished by the mutwullee, and paid the latter his full rent founded on that rent-roll.

Where a man sued summarily for rent in the wrong Court, and obtained judgment, and arrested the defendant, who under the pressure of that arrest paid the sum demanded, the latter recovered back the amount so paid.(*b*)

A surety who has been compelled to pay anything on account of his obligation, can recover from his principal so much as he has paid.(*c*)

For every action of a man which occasions injury to another, the latter is entitled to reparation.

If a farmer holds possession of land after his lease has expired, and against the will of the proprietor, the latter is entitled to receive from him not merely the amount of the farming jumma under the lease, but the whole of the profits which have been illegally collected by the farmer.(*d*)

If two persons in succession are wrongfully in possession of my land, (as where one purchases it wrongfully at an execution sale, and enjoys it for a year, and then sells to the other) a decree in my favor ought to charge each with wasilat and costs only for the time during which he has been in possession, and ought not to charge them in a lump sum against both.(*e*)

(*a*) S. D. 1855, p. 401. (*b*) S. D. 1858, p. 253. (*c*) S. D. 1846, p. 275.
(*d*) S. D. 1856, p. 179. (*e*) S. D. 1856, p. 461.

It may be well to mention here, although the scope of the present work does not admit of a detailed examination of the subject, that the law holds every one responsible for the damage of which he is the cause, not only by his own positive act, but also by his negligence or by his imprudence, or even sometimes by the act of persons under his guidance, or by the operation of things which he has had under his care, and has handed over to the care of incompetent persons.

A man kept certain servants to look after his estates,(*a*) situated four days' journey from his own house. The servants committed trespass and destroyed the indigo crops of a neighbour. Their master was not proved to have known of or instigated their acts, yet he was held liable in damages for the consequences of them. In this case however the law was carried to its utmost limits, and it may be doubted whether the decision is a very sound one.

The owner of an animal, or he who makes use of it while it is in his employment, is responsible for the injury which the animal has occasioned, whether the animal were in his custody, or whether it had strayed or escaped.

The proprietor of a building is responsible for the injury caused by its fall, when it has happened in consequence of the want of necessary repairs or from defect in its construction.

(*a*) S. D. 1855, p. 400.

CHAPTER XV.

SALE.

THE contract of sale being one of the most ordinary contracts between man and man, various portions of the law by which it is regulated have been already touched upon in illustration of other subjects which have been treated of.(*a*)

The thirteenth section of the Punjab Code contains an excellent outline of the law of sale, which is, for the most part, of universal application, though in some particulars(*b*) it derives its validity from the authority by which it was issued.

1.—" Written contracts of sale will be treated in the same manner as all other contracts. Negotiations for sale may be conducted by letter; either party may recede at any time before acceptance shall have been given; but there can be no retractation after the time when the letter of acceptance shall have been posted.

2.—A merely verbal contract of sale, not followed by an act, writing, or proceeding, cannot be enforced by the Courts. But it may be enforced, if any act of ratification shall have ensued, such as delivery of the goods in whole or in part, payment of the price in whole or in part, the setting of the goods apart, the payment of an earnest, or an acceptance of any kind. After such

(*a*) See (e. g.) as to bidding at auctions, p. 1; time given to accept offer, p. 2; commendation by vendor, p. 6; alternative contract, p. 86; consequence of non-delivery, pp. 48, 49; payment for lease never granted, p. 51; deposit money recovered p. 51, (and see S. D. 1857, p. 257); non-acceptance of thing purchased, p. 58; precedency of conditions, pp. 79, 80; tender, p. 100.

(*b*) Punjab Code, p. 35; s. 1 to end of s. 12, p. 29.

partial ratification, neither party can recede nor can the seller re-sell the goods.

3.—Until either the price shall have been paid, or delivery made of the goods, an absolute transfer of the property has not been effected; and, consequently, any loss or injury of the property which may occur, will be at the cost of the seller. After the price has been paid, or delivery made, any loss or injury which may occur will be at the buyer's responsibility. If after the sale has been completed and the price paid, the property should be left with the seller, even then the buyer is responsible for loss or injury.

4.—Delivery may be either *actual* or *constructive*. Actual delivery to the buyer does not need further specification. All other deliveries will be considered constructive. Delivery to an agent of the buyer is valid, but not if made to an agent of the seller. So also delivery to a common carrier, or to a boatman, or to any other carrier at the buyer's request; consignment to any person; or location in any place by the buyer's direction, is tantamount to delivery. So also the delivery of the key of a godown, or any symbolical act of that nature, may be construed as delivery of the goods. In all cases of constructive delivery, the seller is responsible for ordinary care and diligence in the procuring of good carriage and in effecting good arrangements.

5.—The seller has a lien on the goods, (if they should not have been delivered), until the full price has been paid, unless some particular date for payment shall have been fixed: in which case the seller will be considered to have waived his lien. The lien also exists up to the date of delivery, and even if the goods, having passed out of the seller's hands by delivery, should be in transit to the buyer, still the seller may stop them if the price

should not be paid, or if there should be reason to believe that, from the insolvency of the buyer, or other cause, it will not be paid. But this right of stoppage and seizure ceases from the moment that the goods come into the possession of the buyer, and from that time the seller's lien is extinct.

6.—If the price should have been fixed or agreed upon in writing, then that amount will be decreed. But if the agreement shall have been only verbal, then, upon such proof, an exorbitant price will not be decreed. The Court will, in its discretion, cause a reasonable price to be fixed.

7.—If property be purchased "*in market overt*," that is in a bazaar, open shop, frequented place, public sale, or auction, then a defective ownership in the seller will not affect or invalidate the title of a *boná-fide* purchaser who had paid the full price. The original owner cannot recover from the purchaser, though he may have his remedy against the seller. But if the property should have been purchased by private sale, not in market overt, then the purchaser cannot acquire a valid title from a seller who had not ownership; and the rightful owner can recover such property from the purchaser, who may then obtain what redress he can from the vendor.

8.—A warranty of freedom from concealed defect and blemish is implied in every private contract of sale, where the purchaser may not have specially agreed to take the article with all its faults. If after the purchase, the purchaser should discover such defect, he may, within twenty-four hours, return the article and claim a refund of the purchase money, provided that he shall not, in any way, have injured it or made beneficial use of it. The term of twenty-four hours mentioned above, may, at the Court's discretion, be extended to a further period, not exceeding one week. But

nothing in this clause will apply to purchases made at public sales or auctions. Such purchases cannot be annulled on subsequent discovery of defect.

9.—If property may have been recorded in the name of a relative of the real owner, by an agreement of the parties, this circumstance will not prevent the owner from disposing of it. So also proprietors cannot, by entering their property in the names of relatives and others, preserve it from liability for debt. On the proof of such collusion, the property may be exposed for sale or converted into any other means of discharging the owner's liabilities. But this clause is not intended, in any wise, to weaken the authority of the public records of landed property.

10.—In the sale of real or ancestral property, the restrictions mentioned in Sec. IX. must be observed.

11.—The right of pre-emption is declared to exist in communities of land-holders, however constituted, under whatever tenure the state may be held. Whenever any member of such community is desirous of selling or permanently transferring his share, he must offer it to the community at large, or to individual co-partners. If there should be any hereditary cultivators on the estate, the right of pre-emption will appertain to them, next after the proprietory sharers. If the price be not agreed upon privately among the parties, it must be referred to the revenue authorities, who will cause it to be fixed by a valuation committee. If the community, or members thereof, be not willing to accept terms, thus determined, the intending seller may dispose of the property in any manner he pleases. But if he have effected a sale without offering an opportunity of pre-emption, then the community, or any member of it, may, within three months from the date of the transaction, bring a suit for rescinding the sale. The

same rules will pertain to the foreclosure of mortgages, and to sales in execution of decrees. If there should be contending claimants for the pre-emption, the Court will call upon the revenue authorities to determine the preference. The Court will not undertake the determination of the price, but will apply to the revenue authorities for that purpose. But the principle of pre-emption is not applicable to simple or collateral mortgages, hypothecation, pledge, leases or other temporary transfers. In villages and qusbehs, the site and ground, occupied by the sharer in the estate, will be subject to the right of pre-emption as above described; if the intending seller be a non-proprietory resident, the pre-emption pertains to the land-holding community. In the two last cases also the price, and the priority between claimants, will be determined by the revenue authorities.

12.—If a sharer in any joint undivided property, not land, be desirous of permanently transferring his share, the right of pre-emption will pertain to the co-sharers, and may be enforced by the Courts. If in any town, city or village, or in any mohula, ward, or sub-division thereof, the custom of pre-emption may be known to prevail, it may be enforced under the same rules as in the co-parcenary communities. The Court will fix the price with the aid of a valuation committee, composed of three arbitrators, two appointed by the parties (one by each) and one by the Court; the preferential right between contending claimants will be determined by the Court, with reference to vicinity, relationship, or the merits of the case."

Where weighment or counting is necessary.

In the sale of things which consist in quantity, and which are sold, not in bulk, but by weight, number, or measure,—as if one should sell 50 maunds of rice out of a larger bulk in a granary, or 50 fish out of a tank,—the sale is not perfect, so as to vest

any right of property in the purchaser, or to make the articles stand at his risk, so long as the rice has not been weighed, and the fish counted, for up to that time it does not sufficiently appear which is the very rice, and which the fish, that constitute the object of sale. The sale is of an unascertained object, and one which cannot be ascertained but by the weighing and counting. The thing sold therefore remains at the risk of the seller: but the purchaser may demand either delivery thereof, or damages, if he has sustained any, in case of non-performance of the engagement.

By the law of England,—by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shewn that such was not the intention of the parties. Various circumstances have been held to indicate such contrary intention. If it appears that the seller is to do something *on his own behalf* to the goods sold, (as, to weigh them previous to delivery) the property will not be changed until he has done it, or waived his right to do it. Where, again, the seller is to do something *for the benefit of the buyer*, to place the goods in a state to be delivered, (as, to fill up casks of turpentine which have been sold)—until he has done it, the property does not pass. So also, if an act remain to be done by or on behalf of both parties before the goods are delivered, (as, where the goods are to be weighed by two persons, one to be named on each side)—the property is not changed.

A sale made on trial is always presumed to have been made under a condition precedent, namely, the approval of the article by the purchaser: and until this is given the contract is not complete. Sale on trial incomplete.

If the quality of the article tendered be inferior to that which was bargained for, the purchaser ought at once to reject it.

Reasonable time however will be allowed for examination of the wares.(*a*)

What may be sold.

Every thing which is the "object of commerce" may be sold, where particular laws have not prohibited the alienation thereof, —as for example is the case in the instance of wuqf property.

Any really existing interest, however slight, is capable of being the subject of sale,—as for instance the right of a defaulting proprietor in his property, up to the time of its being alienated by a legal sale.(*b*)

But regard must always he had to the rights of the vendor and to his *status*. Thus in the country subject to the Mithila law the sale of joint undivided property by one sharer is not valid without the assent of all the sharers. It is not valid even for the seller's own share, without the consent of his companions in estate.(*c*)

A chookanee ryot, or a ryot in general not holding by one of the tenures referred to in Act I. of 1845, s. 26, nor having given a bonus for his holding and thereby obtained a right in the property to that extent, has merely a right of occupancy so long as he pays his rent, and not a transferable tenure.

Sale of another's property.

Where a man binds himself to procure the transfer of another's property to the purchaser, he will be answerable in damages if he fails to perform his engagement.

Stoppage in transitu.

The right of stoppage *in transitu*, mentioned above, will not be defeated by the vendor's having consigned the goods to the purchaser, under a bill of lading; but if the latter endorse the bill

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(*a*) S. D. 1857, p. 1864.

(*b*) S. D. 1856, p. 770; S. D. 1858, p. 840.

(*c*) S. D. 1853, p. 344; see more on this head in the Punjab Code, s. IX. p. 27.

of lading to a third party, for valuable consideration, who receives it without notice that the consignee is insolvent and the consignor unpaid, the claim of that party, as assignee of the property under the bill of lading, prevails against the consignor's right to stop *in transitu*.

The seller is bound, generally speaking, to deliver the full quantity as agreed in the contract: and where the quantity is stated, the price must be considered as fixed with reference thereto. Vendor must deliver the whole quantity agreed upon.

The purchaser will be entitled to compensation for a deficiency in quantity, where a certain sum is named and the estate is at the same time professedly bought at so much per biggah,—or where the quantity is stated, and there is nothing to rebut the ordinary presumption that the price was paid with reference to the quantity.

By the English law, where part of the land agreed to be sold turns out to be the property of a stranger, so that the vendor cannot give the purchaser possession of it, the latter is, generally speaking, entitled to enforce the performance of the rest of the contract, with a proportional abatement of the purchase money.(*a*) Compensation for deficiency in quantity.

(*a*) In the only reported Indian case which bears upon this subject, a different rule was applied.

A purchased a certain piece of land from Government at a revenue sale. In the detailed statement of the particulars of the lands to be sold,—which was exhibited, as usual, at the time of sale, for the information of persons wishing to purchase, and upon the credit of which the purchase was made,—certain mouzas, comprised in the land in question, were described as common malguzaree lands, bearing each a jumma, or annual rent, which was specified in the particulars. Another person afterwards came forward and proved that he was entitled, under an old grant, to hold these mouzas at a certain istimraree jumma. The Sudder Dewanny Adawlut decided in favor of the claimant, and also pronounced that the purchaser was at liberty to relinquish his purchase in consequence of the error in the public statements, on the faith of which it was made.*

The purchaser did not avail himself of this permission, and no notice was taken of it in the decree. It is evident that this case is not a direct judicial decision,

* Sel. Rep. 6, p. 176.

A hooda consisted of nine villages, and the supposed proprietor of the hooda sold to a certain person four of those villages, particularly described in the deed, with the addition that they constituted an eight annas share of the hooda,—and expressly reserving the other five villages. It afterwards turned out that the vendor's whole interest in the hooda was only an eight annas share, so that in fact only one-half of the four villages had passed by the conveyance.

It was held that the purchaser had no claim (as against a purchaser of later date) upon the five reserved villages.(a)

Warranty of title.

It seems only just that he who takes upon him to sell any thing, as his own property, and to receive the price of it for his own use, should guarantee to the purchaser the peaceable possession of the thing sold, and should be liable to refund the price, if the purchaser is evicted by one having a better title than the vendor had. In such case the consideration for which the money was paid, fails entirely.

1. In case of goods.

A man who sells goods as his own, is understood by the English law to warrant the title; and the purchaser may have satisfaction from him if the title prove deficient, although there may not have been any express warranty for that purpose.

The rule in clause 7 of the Punjaub Code that if property be purchased in "market overt" a good title to it is thereby acquired, is a very proper one, and the principle is recognised in the English law, which, however, strangely does not recognize sales in any shop save those of the city of London, as being sales in market overt.

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except as regards the claim of the plaintiff to the property in question: any difference between the purchaser and the vendor (Government), could be determined only in a suit brought by one of them against the other, for this express purpose.

(a) S. D. 1855, p. 536.

It is to be observed also, that if the purchase has been made in a private shop, it must—in order to enjoy the privileges of a purchase in market overt—be a shop in which articles of the same kind are usually sold. The purchase of an ordinary saddle in a jeweller's shop, for example, would not be protected.

2. In case of immoveable property.

But where immoveable property is the subject of purchase, and where the contract has been completed by the payment of the price and delivery of possession,—if the vendor does not assume upon the face of the conveyance, to be the owner of an estate in fee, or to be possessed of any particular estate or interest in the lands or tenements conveyed, but merely transfers and conveys such lands and tenements generally and all his estate, right, title, and interest therein,—the purchaser cannot maintain an action for the recovery of the purchase money on the ground that the vendor is not clothed with the estate or interest which he was supposed to have possessed. It is considered that the purchaser ought to have informed himself fully before he parted with his money.

According to the Roman law, a warranty of title was, as a general rule, implied on the part of the vendor of land, so that in case of eviction, total or partial, an action for damages lay against him at the suit of the vendee. And the French law is to the same effect.

As to the law which prevails in the Civil Courts of this country, there is an absence of any long established practice or of any old authority.(*a*)

It was laid down in a recent case, by a majority of two out of three Judges of the Sudder Court, that in the absence of an express warranty of title, there is no warranty implied in a simple

(*a*) S. D. 1856, p. 129.

sale of land; and that after a deed of conveyance has been executed and the purchase money has been paid, and possession of the land obtained by the purchaser, no action can be maintained by the purchaser for a refund of his purchase money, on his dispossession in consequence of the title of the vendor being set aside by a Civil Court.

The majority of the Court considered, that in the instance before them it was the purchaser's duty to have looked into the vendor's title, and to have made sure of his own bargain, and that not having done so, he must pay the penalty of his imprudence. A purchaser can always protect himself by a covenant for title, or by a stipulation in the deed of sale, binding the vendor, in case of the purchaser's dispossession under a title superior to his own, to repay the purchase money.

The law, however, upon this point can scarcely be said to be finally settled,—for in the case just cited, a review of judgment was subsequently admitted, and the decision reversed on its being brought to the notice of the Court that the conveyance did in fact contain words amounting to a warranty.(a)

Refund by Government on eviction of purchaser at revenue sale.

In one case a sale for arrears of revenue having been set aside for irregularity and the purchaser turned out of possession and decreed to pay mesne profits, he was held entitled to recover purchase money with costs from those who had received it.(b)

Vendor has lien on land for purchase money.

Where land had been purchased, the purchase deeds executed and registered, and part of the purchase money had been paid, the Court refused to take the possession of the land from the vendor and give it to the purchaser, holding that although the sale was complete, yet the vendor had a lien upon the land for the

(a) S. D. 1857, p. 670; and see S. D. 1856, p. 905; S. D. 1858, p. 1435.

(b) S. D. 1845, p. 270.

balance of the purchase money, i. e. a right to retain the land until he had been fully paid for it.(*a*)

Warranty of quality of things sold.

With regard to the quality of wares purchased, the vendor is not by the English law bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and has used any art to disguise their condition. Yet upon a contract for the purchase of goods of any particular denomination, where the purchaser has had no opportunity of inspecting them before they are delivered, there is an implied warranty on the part of the seller, that they shall be of a quality saleable in the market under the denomination in question. And whether there is an opportunity of inspection by the buyer or not, the seller of an ordinary commodity, manufactured in the particular instance by himself, and bought for a known and ordinary purpose, impliedly warrants (as it should seem) that it has no latent defect to make it unfit for that purpose.

As to an express warranty, it is to be observed, that it may relate not only to the title to or goodness of the article, but to its quality in any other particular. The use of the word "warrant" is not in any case essential, for the mere representation may amount to a warranty.

How credit is assigned.

In the transfer of a credit, of a claim, or of a right of action against a third person, the delivery is effected, between the party ceding and the party receiving, by assignment of the title. But the assignment is not complete with regard to third persons, until the transfer has been notified to the debtor.(*b*)

If, before the assignor or the assignee have signified the transfer to the debtor, the latter have paid the assignor, he is discharged.

(*a*) S. D. 1858, p. 601.

(*b*) Supra, p. 72.

The sale or cession of a debt comprises the accessories of the debt, such as mortgage and other securities.

He who sells a credit or other incorporeal right, guarantees the existence thereof at the time of the transfer, although the sale be made without express warranty.

Rights and liabilities of purchaser of land.

Where land is bought and sold, the purchaser becomes *at once* entitled to the rents and liable to Government for the revenue, and to the vendor for the price or interest upon the price, if the agreement does not provide otherwise.(*a*)

Where an ayma mocurruree tenure has been sold for rent, the purchaser is not(*b*) responsible to the superior for kists antecedent to his purchase. And if, after obtaining possession, he collects kists due to the former mocurrureedar, the right to them is to be decided on suit by the former mocurrureedar against the purchaser, and not on the suit of the zemindar for his rent.

Where a talook is sold for arrears of rent, and an under-tenure created by the talookdar is thereby destroyed, an action by the under-tenant to recover out of the proceeds of sale (which would otherwise be paid over to the talookdar) the price he paid for the interest he held in the tenure sold, must, in order to prevent any unnecessary delay in the distribution of the proceeds, be brought within two months after the sale.(*c*)

Effects of receipt of purchase money.

By Act I. 1845, s. 24 (following Act XII. of 1841, s. 25 and the former Sale Law Regulation XI. of 1822, s. 27,) no person is entitled to contest the legality of a sale after having received any portion of the purchase money, and it has been decided(*d*) that if one of several joint owners of an estate which has been sold for arrears of revenue receives his share of the purchase

(*a*) S. D. 1855, p. 535. (*b*) S. D. 1845, p. 488.
(*c*) Reg. VIII. 1819, s. 17, cl. 5; S. D. 1845, p. 48. (*d*) S. D. 1855, p. 31.

money, his co-sharers cannot (so intimate is their union) be allowed to contest the legality of the sale, as the effect of a judgment in favour of the plaintiff would be to restore to the co-sharers that which they had forfeited by their voluntary act.

It has also been laid down that if a man allows the proceeds of sale to be applied in discharge of a judgment debt due from him, and does not oppose such application of it, the effect is the same as if he had received the proceeds himself.(a)

Deduction of nankar from revenue charge.

A man held a nankar(b) annual pension of Rupees 1,881 from Government, which had been granted to his ancestor in perpetuity. He also held an estate as zemindar for which he paid to Government a sudder jumma of Rupees 3,544-1-10. By an arrangement between the zemindar and the Government, the jumma of the estate was reduced to Rupees 1,663-1-10, the zemindar being relieved of the difference, Rupees 1,881, on giving up his nankar pension.

In accordance with this remission of revenue, the towjee, or revenue account, of the mehal was altered, and in place of the former sudder jumma, the reduced rate of jumma was entered. The revenue having fallen into arrears, the mehal was put up to sale with this reduced jumma affixed to it, and was sold in the usual manner without any stipulation as to the payment of the stipend to the old proprietor as formerly enjoyed by him.

It was held in a suit by the assignees of the original owner against the purchaser, that the sale was an "out and out" sale of the estate burdened with payment of the Government jumma only as then assessed upon it, and that the reduction of the amount of jumma was a permanent reduction, the value of which

(a) S. D. 1856, p. 859.

(b) Wilson's Glossary, p. 367.

devolved upon the purchaser and could not be claimed by the pensioner.(*a*)

A byenamah or certificate of purchase of an estate sold by Government for arrears of revenue may be the exponent of an old existing interest, but not the originator of a new estate.(*b*)

The proceeds of sale of land sold for arrears of revenue are subject in the hands of the collector to all the claims and rights legal and equitable to which the land would have been subject if not sold.(*c*)

Although the right of pre-emption is an important right, it can hardly be considered as requiring to be treated of, as a part of the law of contracts. It is merely a right to enter into a contract; the contract itself is subject to the ordinary rules.(*d*)

Barter is a contract by which the parties mutually give one thing for another: and it is effected by consent only, in the same manner as a sale.

If one of the exchanging parties have already received the thing agreed to be given him in barter, and if it afterwards prove that the other contractor is not the proprietor of such thing, the former cannot be compelled to deliver that which he has promised to deliver, but only to restore that which he has received.

All the other rules prescribed for the contract of sale apply also to barter.

(*a*) S. D. 1856, p. 185; in S. D. 1858, there is also a case bearing on this point.
(*b*) S. D. 1856, p. 348. (*c*) S. D. 1845, p. 116; S. D. 1851, p. 200.
(*d*) Punjab Code, pp. 38, 39; see Agra, 1849, pp. 137, 295; Agra, 1850 ,p. 21: Reg. VII. 1832, s. 9.

CHAPTER XVI.

AGENCY.

As between principal and agent.

PROCURATION is an act by which one person gives to another the power to do something for him, and in his name.

The contract is not binding without acceptance on the part of the agent.

Authority to act as agent may be given by one person or firm to another, not only by express written appointment, but by words and acts,—as where a man introduces another as his agent, or receives goods ordered by him, and honours his drafts. It may even be inferred from his silence and acquiescence.(a) So also acceptance of the office of agent may be inferred from the act of the person appointed.

Agency is either special and for one affair or certain affairs only, or general and for all the affairs of the principal. Thus, when a man in general terms appoints another to be his agent for a particular estate, the agency extends only to acts of management of that estate. If it is intended to confer upon the agent a power of alienating or mortgaging, or of doing any other act of ownership, power must be expressly given to him for that purpose.

In the absence of any authority to borrow, and of any instance of consent on the part of the principal to his borrowing, the act of the agent in borrowing cannot be held binding upon the principal,

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(a) S. D. 1848, p. 374; S. D. 1850, p. 454; S. D. 1847, p. 332.

in so far as respects a claim set up by the lender. The agent may prefer a claim against his principal, shewing that he borrowed the money in good faith and expended it on behalf of his principal: but the lender has no such claim where there is no proof that at the time of making the advance, he was duly authorised to look to the credit of the principal.(a)

If the principal authorised his agent to contract the loan, the principal is equally answerable to the lender, although the agent may have misappropriated the money.(b)

The principal is not bound by any act done by the agent beyond the general scope of the power given to him, and if in any matter that power is exceeded, the agent alone will be responsible in the transaction.(c)

Women and minors may be agents.

The Sudder Court has held(d) that the local agents of absentee proprietors must be considered to be general agents for their employers, and that there is a delegation to them to do all acts connected with the property for which they are the agents,—and consequently that a hookumnamah or agreement by a gomastah to grant a pottah or lease from year to year to a tenant who had no notice of any private restriction upon the gomastah's powers, was binding upon the absent proprietor.

The agent is bound to accomplish the commission as far as he has undertaken it, and is answerable for the damages which may result from his non-performance.

The agent is answerable not only for fraud, but also for mistakes which he commits in his management.(e) But the responsibility relative to mistakes is applied less rigorously to an

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(a) S. D. 1850, p. 599; S. D. 1855, p. 52. (b) S. D. 1857, p. 671.
(c) S. D. 1856, p. 920. (d) S. D. 1858, p. 1547. (e) See S. D. 1858, p. 1132.

agent who acts gratuitously than to a paid agent: and in the former case it is enforced only in the case where there has been gross and extreme negligence.

An agent, at the time of the termination of his agency is entitled to set off, in account, against disbursements which he may have properly made as agent, any moneys which may have come to his hands as agent. But he cannot so set off moneys of which he may have possessed himself, under whatever character, after his powers as agent had ceased.(*a*)

Every agent is bound to render an account to his principal of all that he has received by virtue of his procuration.

The principal is bound to execute engagements contracted by the agent, conformably to the power which has been given him. But the principal is not bound by what may have been done by the agent in excess of his authority, except so far as it has been expressly or tacitly ratified by the principal.

A transaction by an agent not sufficiently authorised may however acquire validity, by subsequent ratification, and in such a case the validity will date from the date of the transaction itself.

The ratification may be expressed in any form—either in writing addressed to the agent or the parties with whom the agent has dealt in the particular matter, or by an acknowledgment in a suit brought by the other side to enforce performance of the contract.(*b*)

To make a principal responsible for the acts of his agent, there must be proof either that special authority was given to the agent to transact business with the particular firm or person who

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(*a*) S. D. 1856, p. 295.

(*b*) S. D. 1856, p. 944.

seeks to make him responsible, or that, without such special authority, the agent has transacted business, generally, on behalf of his principal, and that the latter has ratified his proceedings.

A principal is liable for the acts of his clerk in drawing and accepting bills in his employer's name when the clerk has been in the habit of so drawing and accepting them. In such a case, the authority of the clerk to perform these acts is implied, though not expressly declared.(a)

The principal must reimburse to the agent all advances and expenses which the latter has made in executing the commission. He must also indemnify the agent against losses which the latter has sustained in acting as agent, where no imprudence is imputable to him.

The principal may recal his procuration whenever he thinks proper, and may compel the agent to remit to him, the writing (if any) by which the appointment was made. But(b) if the agency were coupled with an interest, as where it is part of a loan transaction that the borrower appoints the lender his agent to receive certain payments, it cannot be revoked so long as the interest remains unsatisfied.

If the agent be ignorant of the death of his principal, or of any of the causes which put an end to his authority, what he has done in such ignorance is valid.

In the Punjab Code,(c) is the following outline of this subject.

As between agent and the rest of the world.

1. Agency may be general or special. In general agencies, the principal cannot give private instructions to the agent contrary to any public authority which he may have given to him, otherwise third parties would be defrauded. For instance, if an

(a) Agra, 1850, p. 237. (b) See 1856, p. 92. (c) Sec. xv. pp. 41, 42.

agent be publicly notified to have a general authority to sell certain kinds of effects with warrant, but have private instructions, in a particular case, not to warrant, and if in violation of those private instructions he do warrant, the principal is bound by that warranty; so again, if an agent be ostensibly deputed, without any special limitation, to trade in a certain line, and have private instructions limiting his transactions, then if he transgress the limits, still the principal will be responsible to the parties with whom the agent may have dealt.

2. In special agencies, for the performance of a particular business, the principal is responsible for those acts of the agent which may be connected with the "res gestæ," and with the execution of the duty, and for the accessory circumstances arising from the conduct of the transaction.

3. While the principal is responsible to the public for his agent, the agent is responsible to his principal, for ordinary skill, care, and diligence. The agent may be responsible for commercial acts, done in good faith perhaps, but still in contravention of the notorious usage of trade.

4. But if the acts of the agent should have been improper and unauthorised, still they may become binding on the principal, if he should in any way have ratified them subsequently.

5. In matters connected with the agency, any promises or agreements made with the agent may be enforced by the principal; so also agreements may be enforced by the agent on behalf of the firm if he be entrusted with the requisite authority.

6. A married woman may be the agent of her husband.

7. In commercial affairs the principal is bound not only to furnish his agent with efficient instructions, but also to make the agent's powers and position known as publicly as possible, and to

notify the same to those with whom he habitually deals, especially when the agent is deputed to act at a distance, so that third parties may not be induced to trust the agent improperly, or to extend transactions with him to undue limits. On the other hand, the public are bound to ascertain the powers and position of agents, and to examine the credentials with which they are usually supplied. Those who neglect these precautions may thereby subject themselves to liability.

8. The usual powers of agents and gomashtas in mercantile houses will be more specifically described in clauses 7 and 8, section XVII. on "Partnership."

An agent who insures goods in his own name may sue for the amount of the policy, if they be lost.(*a*)

(*a*) Agra, 1850, p. 59.

CHAPTER XVII.

BAILMENT.

IN "Bailment" are included deposit, commission, borrowing, hiring, pledge, or pawn.(a)

1. The leading principle connected with this subject relates to the custody of the property, and to the relative degrees of responsibility incurred by the parties to the several kinds of contract above enumerated.

2. The consideration which governs questions arising out of these cases is, whether the two parties receive mutual benefit from the transaction, or whether any one of them receives greater benefit than the other; and, according to the degree of benefit, is the degree of care and diligence demandable from the party, and the degree of negligence for which he is responsible. In some cases the party in charge of the property is responsible for ordinary care, in others for more, and again, in others, for less than ordinary care.

3. Thus, in deposit, when property is deposited without consideration, for the sole benefit of the depositor, then the risk is chiefly incurred by him, and the depository will be liable only when he may be convicted of fraud or of gross neglect; but if the depository has officiously undertaken the charge, and induced the depositor to confide in him, when, perhaps, better custody was obtainable, then he incurs a greater responsibility than in the last case.

4. On the other hand, in borrowing without any consideration to the lender, and for the sole benefit of the borrower, then the

(a) Punjab Code, Tit. *Bailment,* section xvi. And see S. D. 1857, p. 1132.

latter becomes responsible even for slight neglect. He is bound to be more circumspect than a depository, and must take more than ordinary care.

5. When, however, the transaction is for the mutual benefit of the parties, as in hiring, and in commission, when goods are deposited on consideration, or are entrusted for carriage, or conveyance, or manufacture, then the party in charge is responsible for gross neglect. If he shall have used the article in a customary and reasonable manner, or if he shall have taken ordinary care in the conveyance, or in the manufacture, then the owner must bear any loss that may accrue.

6. To a certain extent, the same principle applies to pawn and pledge, inasmuch as each party receives benefit, the pawner credit, the pawnee security. The debt need not necessarily be extinguished *in toto* by the loss of the pledge, if the pawnee shall have guarded it with vigilance and precaution. On the other hand, the pawner, on the loss of pledge, cannot ordinarily be compelled to pay a debt for which he had already given satisfaction. The pawnee will, in the first instance, be chargeable with the loss. The Court will, in its discretion, decide whether any portion of the loss should, under the circumstances of the case, be borne by the pawner. If there should not appear special considerations in favor of the pawnee, then the whole loss must be borne by him; and in order that fraud on the part of the pawnee may be prevented, it will be understood that when a pledge is stolen or otherwise lost from his custody, the *onus probandi* will rest with him to show that he had adopted every reasonable precaution. The pawnee cannot sell or dispose of the pledge for the satisfaction of the debt, or for any other purpose, without bringing a suit.

CHAPTER XVIII.

PARTNERSHIP.

PARTNERSHIP is a voluntary contract between two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.

Partnership can only be constituted by agreement between the parties. It implies, of course, a community of interest. But a mere community of interest, created by law between two or more parties,—such as the common interest which co-heirs succeed to in the property of their ancestor, or the common interest which joint owners have in a ship which belongs to them,—does not amount to partnership,(a) because in these cases the parties have not agreed to give each other the powers which partners must possess.

Partnership being constituted by voluntary agreement, no partner can introduce a new partner into the society without the consent of all the others. And the heirs or representatives of a partner who dies during the term of partnership, although they succeed to his interest in the partnership property and in the profits up to the time of his death, yet do not become partners unless the others agree to receive them as such.

(a) See S. D. 1845, p. 319.

The extent to which persons under disability may be interested in a partnership has been noticed above.(*a*) Any partnership agreement for immoral or illegal purposes is utterly void.(*b*)

It is necessary that something be contributed to the common stock or fund by each party. But the contributions need not all be of one kind, nor in equal proportions. One may contribute money, another goods, another his personal skill; and in those kinds of business which require no capital, each contributes his personal skill and services only.

Partners are, as between the partnership and the rest of the world, deemed joint-owners of the property which they have thought proper to embark in the partnership business. The proportions in which the partners, as between themselves, are interested in such property, are settled by the partners: indeed, it may be agreed, that the whole shall belong to one of them.

Partners have a joint and mutual interest in the profits of the partnership business; and it is no partnership if there be an agreement that one of the parties shall receive the entirety of the profits. But the proportions in which they are to share in the profits need not be equal. They are settled by arrangement amongst themselves.

Partners are, as between the partnership and the world at large, jointly and severally liable for the losses of the business: as between themselves, the proportion of loss for which each is to be held liable is matter of arrangement.

If there be no precise stipulation between the parties, as to their respective shares in the profit and loss, and no fact from which their intention can be clearly inferred, the better opinion

(*a*) Supra, chap. ii. (*b*) Supra, pp. 30, 31.

seems to be (though it has been a matter of doubt)(*a*) that they ought in justice to share equally in both, even though one may have brought more capital into the business than the others. For none but the partners themselves can know the value they set upon the capital or skill contributed by each, or the personal motives which may have actuated them in making their arrangements.

People are sometimes associated in temporary or occasional partnership for a special purpose, and may or may not place themselves under all the conditions of a general partnership.

If the whole capital stock embarked in an enterprise or adventure belongs to one of the parties, and is by agreement to remain his property, yet if there is a community of profit or of profit and loss in the enterprise or adventure between all the parties, they will be partners in the profit or the profit and loss, as between themselves and also as regards third persons, although they will not be partners in the capital stock.(*b*)

The question, who are the partners in a particular firm, does not very often arise between the parties, because it must be known to and is entirely regulated by themselves.

But third parties, who have dealt with a firm, are of course interested in proving that the firm includes as many individuals as possible, in order that they may have the more property to resort to in satisfaction of their claims. They therefore, not unfrequently seek to make liable for debts due from the firm every one who can by any implication be supposed to be a partner,—even persons playing a very subordinate part and not exercising the

(*a*) See Story's Law of Partnership, p. 30; Smith's Mercantile Law, 5th Ed. p. 28; Addison's Law of Contracts, 4th Ed. pp. 721—742.

(*b*) Story's Law of Partnership, p. 41.

powers of partners. The rule of law appears to be that if a man stipulates that he shall have as the reward of his labour, a part of the profits, as such, so that he is entitled to call for an account of the profits, he is, as to third persons, a partner; but that if he stipulates, not for a specific interest in the business but for a given sum of money, even a sum proportioned to the amount of the profits, that will not of itself make him a partner.

When a merchant, instead of a fixed salary, agrees to give to his agent a certain portion of the annual profit, the latter is one who hires out his own services for a sum which is to be greater or less according to the out-turn of the business,—but he is not a partner.

Factors, brokers, and other agents who are employed to sell goods on account of their principals, and are to receive a commission out of the profits, or a proportion of the profits, or a particular per centage out of the price, or a part or the whole of the price beyond a certain sum for which the goods are sold, as a compensation for their services—not bearing any portion of the losses—such persons are not partners with their principals, either as regards third persons, or as between themselves and their principals.

When a man who is not really a partner and who has no share in the partnership property, losses, or profits, lends his name as a partner and allows the real partners to use it, he becomes liable as a partner to all those with whom the firm has dealings. If the rule were otherwise, creditors who had lent money upon the apparent credit of three or four persons might find in the end that for repayment they must look to only two or three of the number, those two or three being possibly persons to whom without the others the creditors would not have given credit.

So if a known partner silently withdraws from the partnership without giving notice thereof, his silence is equivalent to the affirmation of a continuing partnership, and he will be liable to persons who continue to deal with the firm in the belief that he still remains partner.

An agreement to carry on business in partnership may be expressed in writing, or merely in words, or it may be inferred from the acts of the parties.

If a partnership be formed without express limitation as to time, it may yet be only for a limited period if there be circumstances from which an intention to limit its duration can be implied,—as, for instance, where a lease is taken under such circumstances as to lead to the conclusion that the intention is that the partnership shall last as long as the lease. If not limited in time, a partnership may be dissolved at any time at the pleasure of either partner, and in the absence of stipulations to the contrary in the agreement of partnership it is at all times wholly dissolved by the death of one of the partners. So it is dissolved by the marriage of a female partner, since her husband would otherwise be introduced into the firm without the consent of the co-partners. It is also dissolved by the passing of an adjudication of insolvency under the Insolvent Act against one of the partners, or his attainder for treason or felony, for the essence of the agreement of partnership is, unless it is otherwise expressed, that each undertakes to carry on business with all the others, and not merely with some of them.

Even where the partnership is for a time certain, Courts of Equity have power to put an end to it by decree, in case the incapacity or misconduct of any of the partners has rendered it impracticable to carry it on.

In partnerships, the partners (unless they have otherwise provided by their contract) are joint owners and possessors of all the capital, stock, funds, and effects belonging to the partnership, as well those acquired during the partnership, as those belonging to it at its first formation and establishment. So that whether its stock, funds, or effects be the product of the partnership labours or manufacture, or be received or acquired by sale, barter, or otherwise in the course of trade and business, there is an entire community of right and interest therein between them, and this whether the property be moveable or immoveable. Upon the death of either of the partners, however, his share of the partnership property passes to his representatives, and does not go to his surviving partner. With regard to immoveable property there is a technical exception, inasmuch as the legal title to it devolves according to the common rule applicable to real property held in joint tenancy: but the beneficial interest passes to the personal representatives.

With respect to the powers of each partner over the partnership property, each one, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete right of disposal of the whole partnership interests, and is considered to be the authorised agent of the firm. He can sell the effects of the partnership, or compound or discharge debts due to it. This power results from the nature of the business, and is indispensable to the safety of the public, and the successful operation of the partnership. A like power exists in each partner in respect to purchases on joint account, and it is no matter with what fraudulent views the goods are purchased, or to what purposes they are applied by the purchasing partner, if the seller be clear of fraud or collusion. A sale to one partner in a case within the scope and

course of the partnership business, is in the judgment of the law, a sale to the partnership.

As between the partners themselves, no one has a right to share in any portion of the partnership property, except what remains after the discharge of the debts of the partnership, and each has a right, as against the others, to insist on such debts being discharged before any thing is allotted to any partner or his creditors.

Each also has a lien on the partnership property for what he may have brought into the stock.

And as each partner has an interest in the stock, only to the amount of what shall be found due to him on payment of the partnership debts, the interest which he can convey to his own separate creditors is no greater.

It is a general rule, that each partner is the accredited agent of the rest, whether they be active, nominal, or dormant, as to all matters within the scope of the partnership dealings, and has authority as such to bind them either by simple contract respecting the goods or business of the firm, or by negotiable instruments circulated on its behalf to any persons dealing bonâ fide.

Any restriction which, by agreement amongst the partners, is attempted to be imposed upon the authority which one possesses as a general agent for the others, is operative only between the partners themselves, and does not limit the authority as to third persons who acquire rights by the exercise of the general authority, unless they know that such restriction has been made. And if any partner misapplies the money which he has raised by virtue of his authority as a partner, that misapplication does not affect the party who has advanced the money unless he was privy to the scheme of the partner.

All acknowledgments, representations, declarations, admissions, and undertakings made by one partner during the partnership and relating to the partnership business, will bind the firm,—such an acknowledgment for instance, as that a certain debt is due from the firm.

If one member of a firm, which is a creditor of A, releases or discharges a debt due from A to his firm, that operates as a release from the firm. So if a creditor releases A, being one of a firm, the partners of which are joint debtors to such creditor, that operates as a release or discharge to the firm, and extinguishes the entire contract.

The mercantile usage in this country,(a) as to the liability of all partners for the acts of one of their number, is conformable to the general rule of English law, that the act of one partner, done in the course of, and with reference to, the partnership business, and in the regular course of dealing by the firm, will bind the other partners, though absent. Such an act implies a delegated authority on the part of him who does it: and when an individual deals with one of several partners, he is presumed to rely upon the credit of the whole associated body.

One partner can bind the others.

A partner signing in the name of the firm a bond or bill or any other document, within the scope of the ordinary transactions of the firm, binds his co-partners thereby to third parties, although as between himself and his co-partners he may be solely liable for the amount, as having applied the money to his own separate use.(b)

The firm is not bound by acts of a partner which are wholly unconnected with the business of the partnership, such as the

(a) Agra, 1854, p. 461; S. D. 1852, p. 1054; 1 Sel. Rep. p. 193.
(b) S. D. 1852, p. 1054.

purchase of merchandise of a kind wholly different from that in which the firm commonly deals. Thus for example the purchase of a ship by one of a firm of horse dealers is not binding on his partners: nor is the purchase of pepper, by one partner, binding on a firm which usually deals exclusively in corn.

A single partner has no power to submit partnership matters to arbitration. He cannot sign any deed affecting the immoveable estate of the firm, nor indeed can he execute any obligation under seal, unless he be expressly authorised by the others to do so.

It seems to be the law, though subject to some qualifications, that the minority in number are bound by the acts of the majority, within the strict range of the partnership business, but no farther.

If one partner gives a partnership security, e. g. an acceptance of the firm, for his own private debt, this does not bind the firm unless the other partners assent in some way to the act.

Where a partner has contracted not in the name of the firm but in his own name only, he alone will be bound, although the contract has been used for the benefit of the partnership. Thus if a partner has borrowed money in his sole name, and on his own account, and has applied the money to partnership purposes, the creditor cannot have any action against the firm. For a creditor has his remedy only against the party with whom he has contracted, and not against those who have ultimately been benefited by the contract or have received profit from it.

But it is different if the contracting partner were really empowered to treat and did treat on account of the firm, while he described himself as acting in his individual capacity. In such a case, although the partnership could not be sued on any security of a several nature given by him, still if the transaction had been such as a loan of money or a purchase of goods, the creditor

would have a right to charge the firm, on subsequently discovering the transaction to have been on its account.(*a*)

If a partner purchase goods such as the firm deals in, and apply them when so purchased to its use, a strong presumption seems to arise that he dealt on its behalf. But if he borrow money and contribute that to the firm, such a presumption may perhaps not necessarily arise.

Such are the general features and incidents of the contract of partnership. The special law as to joint stock companies and other incorporated associations, and the rights and liabilities of the partners therein, is laid down in Act XIX. of 1857. This Act enables the partners under certain circumstances to limit their liability.

The law of partnership, as it exists in the Punjab, is thus stated in the Punjab Code.(*b*)

1. A partnership may be formed by two or more persons, whether relatives or not, for any lawful purpose whatever.

2. Partnership may be created by deed, by parole, or by tacit consent, and parties make themselves liable, as partners, by their own declaration or by participation in the profits. Any person who participates, directly or indirectly, in the net profits, may be held liable as a partner, whether he be a recorded and ostensible partner or not. It is impossible to lay down any defined rules as to what constitutes participation in profits. If such a question should arise, the Court must decide it according to the circumstances of the case.

3. Partners may be of various kinds. There may be managing partners (gerant); recorded partners, dormant; and com-

(*a*) Story on Partnership, pp. 211—215.

(*b*) Sec. 17, p. 44.

mandite partners, who furnish funds and capital for the purposes of the partnership, and receive a share in the profits, but who do not take any part in the management of its affairs. Managers and gomashtas, who may not have contributed any stock or capital to the concern, and have no share in the partnership property, may yet enjoy a share of the profit in consideration of their services, and can be made responsible in proportion to the amount they have received. The liability of all partners, of whatsoever class, is of the same nature, though it may be different in degree. Nothing in this clause can apply to those who have supplied capital to a partnership as a loan on interest. If the lender shall only have received interest, and not a share in the profits, then he cannot be made liable as a partner.

4. Partners are free to limit their liability to each other, but they are not so free to limit their liability to the public. Their agreements are binding on them, in their relations with each other, in the adjustment of profit and loss, and in the management of the concern. But unless such agreements should have been notified for general information, and really made known, they will not necessarily bind the public, dealers, or others, in proceedings instituted against the firm, or the individual members of it. If such agreements should be contrary to what has been held out by the firm, or to what the public has had reason to understand to be the constitution of the partnership, they will be absolutely inoperative as regards those who may have dealt with the firm. Thus, if one out of two partners has been apparently a half sharer, and has allowed the public to suppose him to be such, while in reality his share was much less than a half, then he will be liable for a half share in the debts of the firm, and not for the smaller share; and those who have dealt with the firm

may sue him accordingly, inasmuch as they are presumed to have trusted the firm on the supposition that he was a half sharer.

5. It is the positive duty of partners to notify the general terms of their partnership to the public at large, to those who deal with them, and to the choudrees of their bazar, or of their trade. It is necessary that they should keep their books in a regular and explicit form. By the neglect of such precautions they subject themselves to aggravated responsibility. On the other hand, it is the duty of dealers to make themselves informed of the constitution of the firms with which they deal. If a dealer trust a firm, on the supposition that each partner holds equal shares, although it has been publicly notified that the shares are unequal, then he cannot sue them on this understanding—he must sue them according to the recorded shares. Any loss he may suffer hereby would be the consequence of his own negligence.

6. Partnership assets may consist of property, real or personal, ancestral or acquired; of paper money; of unrealized debts and obligations. Such property is distinct from the private property of individual partners. But in many partnerships the partners are relatives and reside together, or they draw on the general funds for their private expenses. In such cases it will be difficult to distinguish between common and private property, and the Court must take care that the distinction is not made use of for the purposes of fraud or collusion.

7. The power of the managing partner, or of other individual partners, to bind the firm, may be limited, but such limitation must be made publicly known, otherwise the acts of the partners will be effective, as regards dealers and others, even as if there had been no limitation. As a general rule, each partner may act as an agent for the firm, in the transaction of that

business for which the partnership was created, and his proceedings, in that capacity, will bind the whole firm. He may purchase or dipose of stock-in-trade for the reasonable ends of the partnership; he may enter into speculations; make bargains and contracts; draw, accept, and endorse bills of exchange; pay the debts of the partnership; grant promissory notes; or dispose of the moveable property of the firm. With certain exceptions, he may do whatever might be done by the whole firm in their particular line of business. But if his acts exceed this limit, he becomes singly responsible. It is impossible to determine, beforehand, what acts do, or do not, fall within the province of the particular partnership, or belong to its legitimate business; or be reasonably supposed by the dealers and the public to be a partnership concern. The Court must, in its discretion, construe the ordinary authority of a partner.

8. But there are certain things which a partner may not do on behalf of the firm without express written authority. He may not purchase, transfer or dispose of real property; he may not take a lease or farm of a landed estate, a ferry, a tax, or any public collection; he cannot institute, conduct, defend or compromise a civil suit; he cannot submit a question to arbitration; but he may do all these things if he produce a power of attorney on the part of the firm. If he act in these matters without such authority, the firm is not bound, though he will be bound personally. In such affairs, the especial consent, by signature, of all the partners, is required. The above rules, regarding the ordinary and special powers of individual partners, will generally apply to gomashtas or agents.

9. If any firm or company should be subject to any special liabilities through its own acts, or be vested with any special

privilege or corporate capacity by public authority, the Courts will give effect thereto. As a general rule each partner is responsible according to his share or interest in the firm. By the mercantile custom of this province, partners are not jointly and severally responsible for the whole debts of the firm, except in the cases hereafter mentioned. They are ordinarily responsible for their full shares. But the Courts will freely exercise their discretion in compelling a rich partner to pay more than his actual share, if it shall appear that this share was not publicly notified, and that the creditors had trusted the firm on the reasonable supposition that he owned a greater share. If there should have been a positive stipulation for joint responsibility, the firm are collectively and individually bound by that agreement. Also, if the partners be brothers or relatives residing together, and subsisting and trading on joint undivided property, whether inherited or acquired, then each and all may be made responsible for the debts of the whole firm. But if any one of the parties should have acquired, by his own means and exertions, property separate from the joint property, then his separate property will be governed by the ordinary rules of responsibility.

10. If some of the partners should be managers and others dormant, then the creditors must sue the managing partners, whom they trusted, for the whole debt; and not the unknown dormant partners, who had never been trusted. But in such a case, the dormant would be responsible to the managing partners. If, however, the creditor having sued the managing partners, cannot recover from them, then he may sue the dormant partners. The same rules will apply to cases, where gomashtas, though not ostensible partners, may have enjoyed a share in the profits as remuneration for their services. The partner will be sued in

the first instance, and if the creditor cannot recover from him, then the gomashta may be sued for the amount he received from the concern.

11. If one partner bring a suit against another, the Court will order a general adjustment of accounts between the parties; suits for single items will not be heard, otherwise litigation would be protracted.

12. The same principles as those described in clause 9, will apply to liabilities for debts jointly contracted, to securities jointly undertaken, and to joint tenancy of land, in the absence of express agreement. Under these circumstances, when property, real or personal, may have been jointly pledged, mortgaged, or otherwise temporarily transferred, any one of the parties may discharge his portion of the obligation and redeem his share of the property.

13. If a partner retire, he usually takes a quittance in full (farigh-kutee) from the firm, releasing him from all his responsibilities, and causes this release to be publicly notified. Should he fail to do this, he will be liable for all the debts of the partnership both before and after his retirement. But if he shall have published the notification, he will not, ordinarily, be liable; his individual liabilities have been accepted by the remaining partners of the firm. The Court can, however, stay the release on the prayer of any creditor pending a final adjustment, and can subsequently annul any release if it should appear to have been obtained with a view to defraud the creditors.

14. But if the partnership shall have been entirely dissolved, then neither the release which the partners may have given to each other, nor any adjustment of accounts which they may have made, will relieve them from any outstanding debts which may be charged against the firm.

15. In the event of bankruptcy or insolvency, the Court will cause the joint and the private property of each partner to be collected, and having in the same manner collected his joint and his private debts, will cause the one to be discharged by the other distributing rateably to each creditor: that is to say, the sum total of each partner's assets of all kinds will be set against the sum total of his liabilities of all kinds. It will not be legal to assign one proportion to the partnership debtors and another to the private debtors, nor will it be legal to set the aggregate of the assets of the whole firm against the aggregate of their liabilities; otherwise injustice would arise, inasmuch as some partners might have more private property, and fewer private debts, than others.

16. If one partner should die or become incapacitated, the firm will not necessarily be broken up; the remaining partners would be at liberty, either to give him, and his estate, a full release, or to admit his heir or representative to the partnership.

17. It is the duty of choudrees to give currency and publicity to all notifications of partnership; to see that the proper books (buhee) and registers are kept according to the usage of trade; to aid in winding up concerns when partnerships are dissolved; when bankruptcy or insolvency occurs, to act as official assignees and administrators of the effects, to assist in procuring a true registration of assets and liabilities, and in effecting compositions with the creditors.

18. The preceding clauses are conformable to the general tenor of the Hindoo and Mahomedan Laws, and to the mercantile usage of this province. If questions should arise, for which no provision has been made in this section, they must be decided according to custom, which the Court will ascertain from choudrees, or other competent parties.

CHAPTER XIX.

SURETYSHIP.

He who becomes security for the performance, by another, of an obligation, subjects himself to the satisfaction of such obligation towards the creditor, if the debtor fails to satisfy it himself.

Security cannot be presumed; it must be express, and it cannot be extended beyond the terms in which it has been given.

The engagements of sureties pass to their heirs, so far as assets come to the hand of the latter.

The surety who has made payment, has his remedy against the principal debtor, for principal and all expenses he may have been put to as surety.

The surety who has paid the debt, is invested with all the rights which the creditor had against the debtor.

Where one becomes surety for the due payment of rent by a lessee during the whole term of his lease, the heir of the surety, though not named in the instrument, is bound to make good the undertaking of his ancestor.(*a*)

The surety may defend himself against the creditor by any plea which might be used by the principal, except such a plea as is purely personal to the debtor.

The law as to suretyship is thus laid down in the Punjab Code:(*b*)

"The limits of a surety's responsibility, will be decided by the terms of the agreement. In the absence of express stipulation

(*a*) S. D. 1857, p. 1292; and see S. D. 1858, p. 1230. (*b*) Sec. 22, Cl. 3.

his liability will be co-ordinate with that of the principal. On the death of the surety, his estate will be chargeable with the liability of suretyship, and will be treated in the same manner as all other debts: but his heir cannot be held personally responsible."

CHAPTER XX.

INSURANCE.

THE contract of insurance(*a*) is a contract whereby one of the contracting parties agrees to take upon himself, and protect the other from, the risks and accidents to which any particular property or any particular individual may be exposed, and covenants or promises, in consideration of a sum of money, which the other contracting party pays or binds himself to pay him, as the price of the risk run, to indemnify the latter against these risks and accidents.(*b*)

This contract is frequently entered into in India with respect to goods despatched in boats on the rivers, but the reports afford very little information upon the subject. The cases noted below have some bearing upon it, but there is not much to be learnt from them.(*c*)

The insured must have some property exposed to loss, and some real risk to guard against. If he has not, he has no insurable interest, and the contract is void as being in effect a wager.(*d*) But if he has any pecuniary interest, however small, he may insure to the extent of that interest. Freight, or the profit derivable from the carriage of goods, or the hire of a vessel, may be insured. So also may the profit which the owner of a ship or boat ordinarily makes for carrying his own goods in his own ships

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(*a*) See *supra*, pp. 37, 38.

(*b*) Addison on Contracts, chap. x.

(*c*) Agra, 1854, pp. 500—512; Agra, 1850, p. 59; Agra, 1848, pp. 140, 221; Agra, 1849, p. 221; Agra, 1846, p. 167.

(*d*) *Supra*, p. 38.

or boats to a distant market, or any profits fairly expected to be made in the course of trade. And the special property which a carrier has in goods entrusted to him to carry gives him a good insurable interest in those goods.

The insurance may be on goods "lost or not lost;" and if so the indemnity extends to past as well as future losses. This will not however cover losses of which the insured was aware at the time of making the contract. But a mere expectancy cannot be insured.

No one can sue on a policy if he is not actually interested in it. Therefore, if the insured assigns away his interest after making the policy he cannot maintain an action on it for his own benefit, or otherwise than as trustee for the assignee of the interest.

When goods in transit by land or water are insured, the insurance is effected on the implied understanding that the journey or voyage insured will be performed in the usual and customary course and without unnecessary delay. The risks insured against, or those which are excepted, ought to be specified in the contract of insurance.(*a*)

The Punjab Code contains the following notice of this subject:(*b*) "In this province, it is customary to insure only such property as may be in transit by land or water. The responsibility of the insurer varies with the terms of the agreement. In some cases he is liable for any damage, partial or entire, which may befal to the property, sometimes for only one or the other, the rate of insurance varying with the degree of responsibility. The policy of the insurance generally exceeds the value of the property, and the insurer arranges the transport through his own agents. If the goods should have been given in charge of the

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(*a*) Addison on Contracts, chap. x.

(*b*) Sec. 22, cl. 4.

owner's servants, those servants will be responsible for ordinary care. If the property should have been destroyed or injured through their gross negligence, the insurer may refuse to pay the policy. Insurance contracts, like all other contracts, will be vitiated by fraud on either side."

It seems to be held in the N. W. Provinces that when an insured boat reaches the ghaut, the policy is at an end, which is reasonable enough, but that among the Calcutta river insurance offices, the practice is to extend by the terms of the policy the liability of the insurers until a period of twenty-four hours shall have elapsed from the boat having anchored at the ghaut.(*a*)

(*a*) Agra, 1848, p. 221.

CHAPTER XXI.

BILLS OF EXCHANGE.

There are few cases reported upon this subject, although there are innumerable transactions between natives every day relating to it. I shall therefore confine myself to an outline (copied from the best modern work of high character) of the English law, and to a reprint of the sections of the Punjab Code which relate to bills,—noticing at the same time such of the few reported cases as appear likely to be useful.

A bill of exchange is a security originally invented among merchants in different countries, for the more easy remittance of money from one to the other. It may be defined as a written order from one man to another, desiring him to pay a sum, named therein to a third person, on account of the writer; and by this method a man at the most distant part of the world may have money remitted to him from any trading country. Suppose B lives in Calcutta, and owes A, who lives in England, £1,000. Now if C be going from England to Calcutta, he may pay A the £1,000 and take a bill of exchange drawn by A in England upon B in Calcutta, and receive his debt when he comes thither. Thus does A receive his debt, at any distance or place, by transferring it to C, who carries over the money in paper credit, without danger of robbery or loss.

The person who writes this order (A) is called in law the drawer, and he to whom it is addressed (B) the drawee, and the third person (C) to whom it is payable, is called the payee.

If a bill be made payable, as is most usually the case, *to order*, that is, either to a certain person and his order, or merely to his order, (which is in all respects equivalent) it is said to be *negotiable*, that is, freely assignable from man and man: and the payee may by indorsement or writing his name on the back, assign over his interest in the bill. Such indorsement may be either in blank or in full. In the former case, the payee simply writes his own name; in the latter, he also names the intended assignee, as the person to receive payment. To the intended assignee, in either case, he delivers over the instrument so indorsed; and such assignee, or indorsee as he is called, may indorse in like manner to another, and so on in infinitum.

If the bill be payable simply to a person named, and not to order, it is not negotiable. On the other hand, if made payable *to bearer*, it is negotiable without any indorsement, and by mere delivery; and the case is the same when a bill, payable to order, is indorsed in *blank* by the payee,—for it may afterwards be transferred, either by a new indorsement and delivery, or by simply delivering it to the intended transferee.

When the time arrives at which a bill is intended to be payable it is said to be due, or at maturity. But this is not precisely the time expressed for payment on the face of it, the custom of English merchants allowing for that purpose, unless it be drawn payable on demand, three additional days, which are called *days of grace;* so that a bill becomes in reality due upon the third day of grace, and not earlier, unless it fall upon a Sunday, Christmas-day, Good Friday or a day of public fast or thanksgiving, in which case the bill becomes due the day before.

At any time before it becomes due, the person who possesses or is the holder of a bill, whether as payee or transferee, may present it (that is, carry and show it) to the drawee, for his accept-

ance. This it is in his option either to give or to refuse. We shall first suppose him to take the former course.

An acceptance must, in the case of an inland bill, be made in writing on the instrument: in the case of a foreign bill, it may be either written or verbal. The bill may also be either accepted generally, or accepted payable at a banker's. But the latter mode is merely for the convenience of the drawee, and in no respect qualifies his liability; the address at the banker's not having the effect of making the bill payable at the banker's only, unless restrictive words are added to that effect. After acceptance, any person who, as payee, or by transfer whether before or after acceptance, may be the holder of the bill at its maturity, is entitled to immediate payment of the amount for which it is drawn, upon presenting it for payment to the acceptor or at the place where he has made it payable: and if the money be not then paid, has a right to bring an action against the acceptor for the amount. But the holder is, under such circumstances, also entitled to have recourse to the drawer, and to every person whose name was on the bill as indorser, when it originally came to his hands; for each of these parties is a warrantor for the payment of the bill, and it is presumed that it is on the credit of their names—though also on that of the acceptor, where it was negotiated after acceptance—that he has become the holder. His right, however, to have recourse to the drawer and indorsers, is subject to these conditions: first, that he shall have presented the bill to the drawee for payment, on the precise day when it became due; and next, that he give reasonable notice of its non-payment (that is, under ordinary circumstances, notice on that or the following day, or to persons not residing in the same town, by the post of that day, or in case of a foreign bill, by the next ordinary conveyance) to all the parties whom he so intends to charge, or

at least to him whose name was last placed on the bill, in order that the latter may give the like notice to the party next before him, and so in succession, each party being allowed, in turn, a day for the purpose. An indorser so called upon and obliged to pay, is, on the other hand, at liberty to have recourse to the drawer, or to any indorser prior to himself in order, provided such party shall have had due notice; and the same right attaches successively to each indorser, in his turn. But the original payee has of course no prior party to resort to but the drawer; and the drawer can resort to no party but the acceptor, on whom rests all the while the primary liability, and to whom the drawer, or any other party compelled to take up the bill, is always entitled to look for satisfaction.

We shall next suppose the drawee to refuse acceptance,—a refusal which the law will imply, unless he accepts immediately on presentation, or within twenty-four hours after the bill is left with him for the purpose. By such refusal, the person who is holder at the time, becomes apprised that the bill is an ineffectual security, so far as the drawee is concerned, and is therefore entitled to charge the other parties, viz. the drawer and indorsers, and even to charge them *instanter*, as liable to immediate payment, though the bill is not yet arrived at maturity. But to justify any recourse against these parties, they must have notice of the non-acceptance, according to the same law and course of proceeding which has been above stated in reference to the case of non-payment, and such of them as are consequently obliged to take up the bill are entitled, as in that case, to their remedy over, against all prior parties. The holder is besides at liberty, after giving notice of non-acceptance, to take his chance that the bill may, notwithstanding the refusal to accept, be ultimately paid by the drawee, and may accordingly present it to him for that purpose when it

comes to maturity, without thereby waiving his right of recourse against the other parties.

Another case still remains to be supposed, which is that of the bill never being presented for acceptance. In general it is at the option of the holder to make such presentment or not, the object of making it being only to ascertain whether the bill is likely to be paid, and to strengthen its credit, if possible, by the additional security of the acceptor's name. But if a bill be drawn payable (as it often is) at a specified period after sight, or after demand, a presentment for acceptance is indispensable, in order to give sight to the drawee, or to make demand upon him, and thereby to fix the time at which the bill is to become due. The case of a bill never presented for acceptance will not require a separate discussion here; for where that ceremony is omitted, the bill must at all events be presented for payment, and the same law of proceeding against the drawer and indorsers, will then apply, as has been already stated in reference to the case where an accepted bill is presented for payment.

Independently of the notice of non-acceptance and of non-payment, the holder is in England also entitled to have the bill of which either acceptance or payment is refused, protested; and the protest must be made in writing under a copy of such bill of exchange, by some notary public, or if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses. In the case of a foreign bill, such protest is essential to the right of the holder to recover from the drawer or indorsers. After protest, due notice of dishonor having been also given, the holder will be entitled to recover the amount of the bill, with interest and all expenses, including the re-exchange, occasioned by returning it to the country where it was drawn. But upon an inland bill the principal and interest may be recovered, due

notice being given, without a protest,—which is indeed a ceremony not usually observed with respect to bills of this description, though by Statutes 9 and 10, Will. iii., c. 17, and 3 and 4 Anne, c. 9, an inland bill is made liable, if the holder thinks fit, to be protested. By 2 and 3 Will. iv., c. 98, a bill drawn payable in any place other than the residence of the drawee, and not accepted, may be afterwards protested for non-payment in such place accordingly, and no farther presentment to the drawee shall be required.

The law as to protesting bills is, however, of no great moment in India generally,—it not being usual or necessary to protest them there.

A bill, of which acceptance is refused by the drawee, is some times accepted *supra protest*, for honor of the drawer, or for honor of the indorser, as the case may be. That is to say, some friend of the drawer or indorser intervenes, to prevent the bill from being sent back upon him as unpaid, and places his own name upon it as acceptor, after its dishonor by the drawee. This operates not as an engagement to pay absolutely, but only to pay in the event of its being presented for payment to the drawee when it arrives at maturity, of its being again dishonored by him, and protested for payment, and of its being afterwards duly presented for payment to the acceptor for honor. But on these conditions being fulfilled the latter is then absolutely liable, as if he had accepted in capacity of drawee, so far as regards the claim of any person whose name stands subsequent to his for whose honor the acceptance was made, while on the other hand the acceptor, upon being obliged to pay, has a right of recourse against the person last mentioned, or against any party antecedent to him in the series of names. With respect to bills accepted in this method, or bills drawn "with a reference upon them in case of need" (which is a form of draft occasionally adopted), it is provided by 6 and 7

Will. iv., c. 58, that it shall not be necessary to present them to the acceptors for honor, referee or referees (nor where the address to these parties is in a different town, to forward them for such presentment), until the day following the day on which they became due, or supposing the day following to be Sunday, Good Friday, Christmas-day, or a day of public fast or thanksgiving, then not till the next day.

The acceptor is considered in all cases as the party primarily liable on a bill of exchange. He is to be treated as the principal debtor to the holder, and the other parties as sureties, liable on his default.(a)

The nature of the transaction known by the name of *jawabee hoondee* is as follows. A person desirous of making a remittance, writes to the payee, and delivers the letter to a banker, who either indorses it on to any of his correspondents near the payee's place of residence, or negotiates its transfer. On its arrival, the letter is forwarded to the payee, who attends and gives his receipt in the form of an answer to the letter, which is forwarded by the same channel to the drawer of the order.

Where such a letter had been delivered to a banker and had been endorsed on by him to B, on the credit of A the person desirous of making the remittance, and notice of the arrival of the letter had been given to the payee by B—it was held that the banker might still cancel the order by advice to B at any time before payment had been actually made, A having failed in his promise to lodge with the banker the amount named in the letter.(b)

The acceptance of a bill of exchange does not exonerate the seller of it from responsibility, if the amount should not be

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(a) Agra, 1856, p. 27. This case recognizes the English Law: and S. D. 1849, p. 456.

(b) Agra, 1850, p. 305.

paid by the drawee.(a) On the occasion when this was decided, the evidence of certain gomastahs was taken as to mercantile usage. From their evidence it was collected, that although, ordinarily speaking, the acceptor of a bill is primarily liable for its amount, yet, if from any cause he should not pay it, the bill is returned to the person from whom it may have been received; that if the drawer or indorser of the bill be on the spot, the holder should give him information, but that there is no necessity for formally notifying the non-receipt of the amount of the bill; that regular protests are occasionally entered into, but that the practice is neither universal nor necessary; and that the drawer or seller of the bill is, under all circumstances, responsible for the payment of the amount, the seller being considered liable in the first instance, and after him the drawer. In answer to a question as to how far the omission on the part of the holder to give the drawer immediate notice of the non-payment, would exempt the latter from responsibility, the witnesses replied that they were unable to state what would be the effect of that omission, as it was the invariable practice to give immediate notice, and they had never heard of an instance where this practice was departed from.

It has been held that a man may hold authority from another to indorse his name on negotiable instruments for the purpose of discounting and remitting in cash, although he does not hold authority to indorse for the purpose of negotiation generally.(b)

A gomastah is not personally responsible for acts done on behalf of his employers,—as, for example, where he draws a hoondee on their behalf,(c) provided that he acts within the scope of his authority in drawing it.

(a) 3 Sel. Rep. p. 177.

(b) S. D. 1850, p. 480.

(c) Agra, 1847, p. 315. Agra, 1850, p. 398.

Where a negotiable instrument is made,—as where a draft is drawn in favour of A B or order,—no proof of consideration is requisite.(a)

Persons who are not parties in any way to a hoondee, as drawers, acceptors, or indorsers, ought not to be sued on the hoondee by the payee, merely because in a certain transaction they had undertaken to pay to the payee of the hoondee a sum of money stated to be due to him from the drawer of the hoondee, which sum was different from the amount of the hoondee.(b)

The text of the Punjab Code is subjoined.(c)

Bills of Exchange.

1. The parties concerned in a Bill of Exchange are the drawer, drawee, acceptor, endorser, endorsee, payer, payee, and holder.

2. Bills of Exchange (Hoondees) are chiefly of two descriptions; namely "Shâh-jôg," or payable to bearer, and "Nâm-jôg," or payable to the party named in the bill or his order. There are particular formulas for these bills, both as regards phraseology, and the mode of attaching signatures and superscriptions. These forms are well known to commercial people, and should be scrupulously observed. A Nâm-jôg bill may, or may not, be accompanied by a descriptive roll of the party in whose favor it is granted. It may be payable at sight, or after a certain date, specified in the bill or fixed by custom of trade. When payable at sight it is termed "Durshunee." It may be cashed with, or without, security, but when there is a descriptive roll, or when the identity of the holder or payee be known, security is not usually required. A Shâh-jôg bill is considered payable to any respectable person (Shah) who may present it to be cashed. It is payable only after a certain period of usance specified or implied. It is usually cashed on the same condition with regard to security as Nâm-jôg bills. Bills of either kind can be endorsed or transferred,

(a) S. D. 1851, p. 590.

(b) S. D. 1854, p. 203, see p. 403.

(c) Sec. XVIII.

unless the Nâm-jôg bill be accompanied by a descriptive roll, in which latter case a transfer would be inoperative.

3. The terms within which bills or drafts become payable are usually fixed by custom, and vary according to the distance between the places at which the drawer and drawee reside. If the party who obtains the draft desires it to be made payable after a period less than the customary period, he must pay extra interest for the difference between the lesser and the full term. If he cause it to be made payable after a period in excess of the customary period, then he will receive interest on account of the extra period. If he retain the draft in possession after the expiry of the term, he will obtain no interest for that additional period, unless he should have made some special agreement to that effect with the drawee.

4. Parties who may cash, accept, purchase, or receive with endorsement, Bills of Exchange, are bound to exercise due caution, and to require adequate security, from the opposite party in the transaction :—unless, indeed, such party be well known as trustworthy. If the payer, acceptor, receiver, or purchaser, act without certain knowledge, or without the precaution of security, he will be liable for any injury, which may accrue on account of the transaction, to other parties concerned in the draft. The surety affixes his signature on the face of the bill, and thereby becomes responsible for its amount. If there be several sureties, each will be liable for his share, and no more.

5. If the consideration for which the bill was granted to the holder be illegal, or grossly insufficient, or if there be involved any of those circumstances which would ordinarily vitiate a contract, then such draft may be declared invalid as between those parties; but if it have been transferred to a *bonâ fide*

transferree for a good consideration, then it will be valid as between the parties to such transfer; and so also it will be valid as concerns those who may, in good faith, subsequently become parties thereto.

6. It is ordinarily incumbent on the holder of a bill or draft to present it for acceptance within the term, if possible, and to apply for payment immediately on the expiry of the term. But it is not uncommon for holders, having obtained acceptance from the drawee, to retain bills in their possession for some further time, which may be greater or less according to accident or circumstance, especially when they repose confidence in the drawee. If, after this interval, the bill should not be cashed on presentation, or if, in the interim, the drawee should become insolvent, still the holder may demand payment from the original drawer, and is not rendered responsible for what may appear to be the consequence of his own neglect. In these cases, it is the drawer who, by mercantile custom, is made responsible for the exercise of vigilance. He is expected to ascertain the fate of the bill he has drawn, to enquire whether it has been presented, accepted, or cashed. Of these circumstances he can satisfy himself by demanding the return of the "Kho-kha," i. e. of the original bill, with a certificate of payment inscribed thereon. If, from the information he is thus supposed to acquire, he should be dissatisfied with the delay that has taken place, or should be doubtful as to the ulterior results thereof, he can cancel the draft, cause payment to be stopped, or make such arrangements as may conduce to the protection of his own interests. If he omit these precautions, he must bear the consequences. If, under the above circumstances, however, the holder, having procured the acceptance of the bill, should subsequently engage in dealings with the acceptor, and if the acceptor should then refuse or fail to cash the bill, the loss

must be borne by the holder, and the drawer cannot be required to make good the amount.

7. The acceptor inscribes the word "accepted" at the foot of the draft. The money will be paid to the holder, whoever he may be, whether he be the same person who originally presented the bill for acceptance, or not. The whole, or a part of the amount, may be paid according to the convenience of the payer and payee. If any objection be made by the drawee, or acceptance refused, or partial payment only be tendered, or if, for any reason, payment be not rendered, the holder is bound to give immediate notice to the drawer, and to any other of the antecedent parties to the bill from whom he may intend to demand payment. If the drawee have information of the drawer's death or insolvency, he ought not to accept or cash the draft; still if he do so, he can recover from the drawer's estate. If the bill be for a large amount, some days of grace will be allowed for payment, and such limited period of usance will be fixed by custom.

8. If the bill be lost or stolen, the holder must give the earliest practicable notice to the drawer and to the drawee. But if he obtain a duplicate (penth) or triplicate (purpenth), he may still obtain payment from the drawer, notwithstanding that the original bill should have been cashed in the interim, inasmuch as the payer will recover from the payee or his sureties. If no security should have been taken, then the payer must pay a second time to the rightful holder, and re-imburse himself as he best can for his loss in the first mistaken payment.

9. The endorsee or purchaser is bound to act with caution; if the seller or endorser should, eventually, appear to have had no title, and to have merely found or stolen the bill, the endorsee must make good the amount to the proper owner on demand, recovering as he can, from the endorser, that is, from the thief

or the finder, or from the sureties, should any have been obtained.

10. There may be a special endorsement on a Shâh-jôg bill, though it is not absolutely necessary. If the bill should have been transferred by mere delivery, without such endorsement, it will be difficult to bring the transaction home to the intermediate parties. But a regular endorsement is essential to the transfer of a Nâm-jôg bill.

11. Immediately that an objection, either as regards acceptance or payment, has been made by the drawer, the holder, having given notice, may sue the drawer and all other antecedent parties at once, and may obtain a decree against all, and may execute it against whomever of them he pleases. But he can only obtain the full satisfaction once. He may commence his suit immediately on non-acceptance, without waiting for expiry of term of usance.

12. Payment should be made to the holder himself, or to his accredited agent, and the bill should be delivered to the payer; a receipt of payment should also be endorsed.

13. A gomashta may grant, endorse or accept bills without special permission. He will not do so in his own name, but in the name of the firm. Also if he be absent from the House, he may draw and endorse bills, but in such a transaction, he must attach a memorandum to the bill, stating the name of the firm for whom he acts.

14. "Jawabee Hoondees" are merely letters of recommendation; they are rarely granted in this province, and do not require further exceptation.

15. The "anth," a species of premium and discount on drafts current among merchants, formerly ranged at variable rates in different places. For many years past it has been fixed at an

uniform rate of ten per cent., and one rupee extra on each hundred. In Bills of Exchange it is frequently the practice to denote the sum in the rupees of recalled currencies, such as the Nanukshahee, Sika, Furokabadee, &c.

CHAPTER XXII.

THE LIMITATION OF SUITS.

The time within which an action on contract may be brought is regulated by Act XIV. of 1859, the provisions of which are as follows:—

Preamble.

"Whereas it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:—

Limitation of suits.

I. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

Limitation of one year. Pre-emption suits.

1. To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached.

Limitation of one year. Suits for damages, summary suits, &c.

2. To suits for pecuniary penalties or forfeitures for the breach of any Law or Regulation; to suits for damages for injury to the person and personal property, or to the reputation; to suits for damages for the infringement of copyright, or of any exclusive

privilege; to suits to recover the wages of servants, artizans, or laborers, the amount of tavern bills or bills for board and lodging or lodging only; and to summary suits before the Revenue authorities under Regulation V. 1822 of the Madras Code—the period of one year from the time the cause of action arose.

Limitation of one year. Suits to set aside sales under decrees or for arrears of Government Revenue, &c.

3. To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter when such suit is maintainable; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government Revenue or other demand recoverable in like manner; to suits by a Putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent, or other person claiming under him, to set aside the sale of any Putnee Talook or such other tenure sold for current arrears of rent; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.

Limitation of one year. Suits to set aside attachments, &c. by Revenue Authorities for arrears of Government Revenue.

4. To suits to set aside any attachment, lease, or transfer of any land or interest in land by the Revenue authorities for arrears of Government Revenue, or to recover any money paid under protest in satisfaction of any claim made by the Revenue authorities on account of arrears of revenue or demands recoverable as arrears of revenue—one year from the date of such attachment, lease, or transfer, or of such payment as the case may be.

Limitation of one year. Suits to set aside summary decisions, &c.

5. To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case.

Limitation of three years.
Suits to contest certain awards.

6. To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII. 1822, Regulation IX. 1825, and Regulation IX. 1833, of the Bengal Code, or to recover any property comprised in such award—the period of three years from the date of the final award or order in the case.

Limitation of three years.
Suits to recover property comprised in an order made under Clause 2, Section I., Act XVI. of 1838, or Act IV. of 1840.

7. To suits by any party bound by any order respecting the possession of property made under Clause 2, Section I., Act XVI. of 1838, or Act IV. of 1840, or any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case.

Limitation of three years.
Suits for goods sold by retail, &c.

8. To suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue authorities under Regulation V. 1822 of the Madras Code)—the period of three years from the time the cause of action arose.

Limitation of three years.
Suits for money lent, or interest, or for breach of contract where no written contract exists.

9. To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent, or interest, or a contract in writing signed by the party to be bound thereby, or by his duly authorized agent.

Limitation of three years.
Suits for the same where there is a written contract which has not been registered within six months.

10. To suits brought to recover money lent, or interest, or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any Law or Regulation in force at the time and place of the execution thereof—the period of three years from the time when the debt became due

or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

11. To suits in cases governed by English law upon all debts and obligations of record and specialties; and to suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose.

Limitation of 12 years. Suits for specialty-debts and legacies.

12. To suits for the recovery of immoveable property, or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

Limitation of 12 years. Suits for immoveable property.

13. To suits to enforce the right to share in any property moveable or immoveable on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is allegd to be a charge; or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance, as the case may be.

Limitation of 12 years. Suits for shares in joint family property and for maintenance.

14. To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any Lakheraj or rent-free land—the period of twelve years from the time when the title of the person claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that in estates permanently settled no such suit, although brought within twelve years from the time when the title of such person first accrued, shall be maintained,

Limitation of 12 years. Suits to re- Lakheraj or rent-free land.

Proviso if the land has been held rent-free from the time of the permanent settlement.

if it is shown that the land has been held Lakheraj or rent-free from the period of the permanent settlement.

Limitation for 30 and 60 years respectively. Suits against depositaries, pawnees, or mortgagees to recover immoveable property.

15. To suits against a depositary, pawnee, or mortgagee of any property moveable or immoveable for the recovery of the same—a period of thirty years if the property be moveable and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the mean time an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee, or mortgagee, or some person claiming under him, from the date of such acknowledgment in writing.

Limitation of six years applicable to all suits not especially provided for.

16. To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.

Suits against trustees and their representatives for breach of trust, &c.

II. No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding Section, to be computed from the decease of such trustee; provided that nothing herein contained shall prevent a co-trustee from enforcing, against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

Proviso.

Shorter periods of limitation, if prescribed by particular Acts, to prevail.

III. When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

IV. If, in respect of any legacy, or debt, the person who, but for the law of limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission; provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Revival of right to sue by admission in writing.

Proviso.

V. In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase. Provided that in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by Clause 15, Section I.

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees, or mortgagees.

Proviso.

VI. In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immoveable property mort-

VII. In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government Revenue due from such estate, or in a Putnee Talook, or other saleable tenure sold for arrears of rent which, by virtue of such sale, becomes freed from incumbrances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure, became final and conclusive.

Computation of period of limitation in suits to avoid incumbrances or under-tenures in estates sold for arrears of Government Revenue.

VIII. In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of

Computation of period of limitation in

suits between merchants for balances of accounts current.

action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.

Computation of period of limitation in case of concealed fraud.

IX. If any person entitled to a right of action shall by means of fraud have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document.

Computation of period of limitation in suits where the cause of action is founded on fraud.

X. In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

Computation of period of limitation in case of legal disability.

XI. If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased, as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

XII. The following persons shall be deemed to be under legal disability within the meaning of the last preceding Section—married women in cases to be decided by English law, minors, idiots, and lunatics.

What persons to be deemed to be under legal disability under preceding Section.

XIII. In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

Computation of period of limitation in case of absence of defendant.

XIV. In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.

Computation of period of limitation in case of suit prosecuted *bonâ fide*, but in wrong Court.

XV. If any person shall without his consent have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this Section shall bar the person from whom such possession shall have been so recovered or any other person instituting a suit to establish his title to such property, and to recover possession thereof within the period limited by this Act.

Person unlawfully dispossessed of immoveable property may recover possession notwithstanding any title that may be set up.

Suit for dispossession to be brought within six months.

Suit to establish title not to be affected.

Act not to interfere with equitable jurisdiction of Supreme Courts.

XVI. Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court established by Royal Charter in refusing equitable relief on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

Act not to extend to public property, nor to suits for the recovery of public claims.

XVII. This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue, or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.

Act not to apply to suits now pending or to suits instituted within two years.

Suits afterwards instituted to be governed by this Act.

XVIII. All suits that may be now pending or that shall be instituted within the period of two years from the date of the passing of this Act(a) shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act, and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding.

Proceedings for enforcing judgments, &c. of Supreme Courts to be taken within twelve years.

XIX. No proceeding shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived or some part of the principal money secured by such judgment, decree, or order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order,

(a) 4th of May 1859.

but within twelve years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments ar acknowledgments, as the case may be, provided that for three years next after the passing of this Act, every jndgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Proviso as to judgments now in force.

XX. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution.

Time for enforcing execution of judgment, &c. of a Civil Court not established by Royal Charter.

XXI. Nothing in the preceding Section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire.

Preceding Section not to apply to judgments, &c. in force at the passing of this Act.

XXII. No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue authority, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution.

Time for execution of a summary award of Civil Court or Revenue authority.

XXIII. Nothing in the preceding Section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon, or within two years next after the passing of this Act, whichever shall first expire.

Preceding Section not to apply to summary award in force at the passing of this Act.

Operation of Act.

XXIV. This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-Regulation Province or place until the same shall be extended thereto by public notification by the Governor General in Council, or by the local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor General in Council, or by the local Government to which such Province or place is subordinate, all suits which within such Province or place shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act, and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding,"

Trial of pending suits, &c. in any Non-Regulation Province or place to which the Act is extended.

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